Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,
Petitioners,

-against-

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARVIN MENAKER
Texas Bar #13930000
Lyndon Plaza
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ATTORNEY FOR PETITIONER

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A Division of Triangle Pacific Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner herein respectfully prays that a Writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on January 21, 1997.

QUESTIONS PRESENTED

An employee was discharged without warning for giving a false reason for requesting an unpaid hour off. The collective bargaining agreement required "just cause" for discharge and permitted discharge without prior warning for "immoral conduct." An arbitrator found it unreasonable to construe what she did as "immoral conduct" and reduced the penalty to a suspension. the Fifth Circuit held that lying was immoral conduct by definition and ordered her discharge reinstated. The questions presented are:

1. WHETHER IN AN ACTION UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, IT IS PERMISSIBLE FOR A COURT TO SET ASIDE AN ARBITRATOR'S DECISION BECAUSE IT BELIEVES THE ARBITRATOR MISREAD THE COLLECTIVE BARGAINING AGREEMENT.
2. WHETHER THERE IS A CONFLICT AMONG THE CIRCUIT COURTS IN APPLYING THE FEDERAL POLICY OF ENFORCING LABOR ARBITATION AWARDS.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Fifth Circuit are set out below.

PETITIONER:

UBC
Southern Council of Industrial Workers,
Local Union No. 2713
c/o Mr. Ed Jenkins, Counsel Representative
2737 N. Garland Road #15
Garland TX 75040

ARBITRATION GRIEVANT:

Sheila Dixon
Rt 2 Box 1156
Center TX 75935

RESPONDENT:

Bruce Hardwood Floors, a Division
of Triangle Pacific Corporation
16803 Dallas Parkway
Dallas TX 75248

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PUBLICATION

Black's Law Dictionary 7,9

OPINIONS BELOW

The Award of Arbitrator Harr is unreported, but is reproduced in full at Appendix A.[1] The District Court's opinion is unreported, but is reproduced in full at Appendix B. The decision of the Court of Appeals is reported at 103 F.3d 449 (5th Cir. 1997), and reproduced in full at Appendix C.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 21, 1997. (App. C). A timely Petition for Rehearing was denied on February 27, 1997. (App. D). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1). This corrected

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[1] Materials appearing in the Appendix to this Petition will be referred to as App. ___, specific pages under the Appendix are referred to as App. a1, etc.

version of the Writ is filed within the sixty-day time limit set out in the letter from the Supreme Court dated May 22, 1997.

STATUTORY PROVISIONS

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. §173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desireable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

In this case the Court of Appeals vacated an arbitrator's award because it disagreed with his interpretation of a collective bargaining agreement (CBA). The facts as found by the arbitrator, and reviewed by the District Court, are undisputed.

Sheila Dixon worked for respondent

Bruce Hardwood Floors for fourteen years until she was discharged on Saturday, January 14, 1995, because she gave a false excuse.

The power at her home had been turned off on the Thursday night before she was fired because she had not paid her bill. She planned to pay the bill when she received her pay at lunch time on Friday. When she called the electric company during her morning break on Friday, she discovered that unless she paid the bill immediately, the power could not be turned on until Monday. Panicked, at 11:00 a.m., she asked for an hour's unpaid time off for personal business. Her supervisor demanded to know the nature of the business. Embarrassed by her delinquency and concerned that she would not be given the time off, she said that she needed to

get her truck to her daughter so that she could use it to go to the doctor. After consultation, her supervisor said that she could take the time off, but as an unexcused (i.e. unpaid) absence. She clocked out, paid her bill and returned to work in 45 minutes. The next day the Company discovered the true reason for her absence and discharged her immediately on the grounds that she had obtained leave from her job under false pretenses.

Ms. Dixon's employment was governed by a CBA that provided for final and binding arbitration. (App. e3). Under Article 24 of that CBA, discharge was permitted only for "just cause." (App. e5). Under Article 24, Section 2 (App. e6), the CBA required progressive discipline, i.e., a warning for a first offense, then suspension, and finally discharge only

after the fourth offense, for listed or similar offenses. It did permit immediate discharge for twenty listed serious offenses, such as "serious violation of safety rules or inspections" or "being the aggressor in a fight on company property." Among those listed offenses were (15) "punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports" and (16) "stealing, immoral conduct, or an act on the Company premises intended to destroy property or inflict bodily injury."

Ms. Dixon filed a grievance. At arbitration, the Company took the position that immediate discharge, without warning, was permitted because her conduct violated (15) and (16). The Company also argued that Grievant's conduct violated the CBA

provision which provided for loss of seniority (but not discharge) for obtaining leave of absence under false pretenses. (App. e2).

After hearing, Arbitrator Harr concluded that the Company's position that the CBA permitted immediate discharge was "to say the least, unreasonable." (App. a8). Based on testimony that no other employee had been discharged for the same reason as Ms. Dixon, he concluded that the discipline imposed should be reduced to a ten-day suspension and that she should be reinstated and made whole for any loss in excess of the ten-day suspension. (App. a9).

The Company filed suit seeking to vacate the arbitrator's award and the Union filed suit seeking enforcement of the Award. Both parties moved for summary

judgment. The trial court agreed with the Arbitrator that the Company's position was unreasonable and granted the Union's Motion for Summary Judgment. (App. b8). The Court also concluded that the refusal of the Company to abide by the arbitration award was "without justification" and ordered the Company to pay the Union reasonable attorney's fees.

A divided Court of Appeals reversed and ordered that Ms. Dixon's discharge be reinstated. (App. c5). It relied on its prior decisions that "[T]he rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected." By definition, the Court said lying is "immoral conduct," citing *Black's Law Dictionary*. (App. F). The CBA permitted the

employer to discharge an employee immediately for "immoral conduct." In refusing to apply this provision, the Court said, "the arbitrator exceeded the expressed limitations of his contractual mandate." The order for attorney's fees was, naturally, also reversed. Judge Benavides dissented.

REASONS FOR GRANTING THE WRIT

The decision below is plainly contrary to this Court's admonition that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *International Paperworkers Union AFL-CIO v. MISCO, Inc.*, 484 U.S. 29, 38-9 (1989). The arbitrator here, acting within the scope of his authority to

determine whether the grievant was discharged for "just cause," construed that the contractual provision permitting immediate discharge for "immoral conduct" did not include a discharge for lying. Relying on *Black's Law Dictionary*, the Court below said that lying was immoral conduct, overturned the Arbitrator's construction [2] and set aside his award. This was not a mere "misapplication of a properly stated rule of law" but a total disregard for the decisions of this Court.

When a court concludes that an arbitrator's decision is contrary to an

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[2] Even that reliance was mistaken. Black's Law Dictionary defines immoral conduct as "morally evil; impure; obscene; unprincipled; vicious; or dissolute... indicative of corruption, indecency, depravity and dissoluteness... or shameless conduct showing moral indifference to opinions of respectable members of the community..." Black's Law Dictionary (751 6th Ed. 1990). (App. F).

express contractual provision, it is really saying that it reads that provision differently than the arbitrator did. But, as this Court has said:

> It is the arbitrator's construction which was bargained for...and the courts have no business overruling him because their interpretation is different from his.

United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

To permit, as the Fifth Circuit's rule does, a court to reverse an arbitrator's decision because the court believes that he read an "express provision" differently than the court is to destroy arbitration's utility as a final and binding method of resolving contractual disputes and eliminating them as a cause for industrial strife.

Even if it is assumed, incorrectly, that the Court of Appeals properly overruled the Arbitrator's construction of

the words "immoral conduct," there is an irreconcilable conflict among the circuits. The CBA here both (1) required that there be "just cause" for discharge and (2) distinguished between serious offenses such as "immoral conduct" for which no prior warning was required and less serious offenses which required progressive discipline. Many, if not most, American CBA's list specific offenses and also require just cause for discharge. The question of an arbitrator's authority to set aside a discharge of an employee who committed a listed offense is a recurring question of law on which the circuits are squarely in conflict.

In this case, the Fifth Circuit held that the Arbitrator was required to sustain the discharge even in the absence

of a finding of "just cause" because Grievant committed what the Court thought was a listed offense. This was also its conclusion in *Delta Queen Steamboat Co. v. District 2*, 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 112 L.Ed2 114, 115, (1990). The First Circuit came to a similar conclusion in *S.D. Warren Co. v. Paperworkers Local 1069*, 846 F.2d 827 (1st Cir. 1988, *cert. denied 488 U.S. 992* (1988). The Third, Sixth, Seventh and Eighth Circuits have held, to the contrary, that a finding that an employee has committed an offense listed as grounds for discharge does not deprive an arbitrator of authority to set aside the discharge if he concludes that, for procedural or other reasons, there was not just cause for discharge. *Midwest Coca-Cola Bottling Co. v. Allied Sales Division*, 89 F.3d 514

(8th Cir. 1996, *no writ*). Even though the contract gave *Coca-Cola* the right to enforce work rules, it held that where there was a finding of no "just cause" by the arbitrator, the arbitrator's decision had to be enforced. *See also Kewanee Machinery v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1982, *no writ*).

Similarly, in *AOI, Div. of Apogee Coal v. Dist. 12, U.M.W.A.*, 85 F.3d 1289 (7th Cir. 1996, *no writ*), the Court said it would set aside an award:

> ...only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract... (emphasis in original).

Citing Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, 184-85 (7th Cir. 1985), *cert. denied* 475 U.S. 1010 (1986).

In *Typographical Union v.S Chicago Sun-Times*, 935

F.2d 1501 (7th Cir. 1991, *no writ*), the Court pointed out that on judicial review the court is forbidden to substitute its own interpretation, even if convinced the arbitrator's interpretation is wrong.

In *Tanoma Mining Co. v. Local 1269*, 896 F.2d 745 (3rd Cir. 1990, *no writ*), a District Court set aside an arbitrator's decision on the grounds that the arbitrator disregarded the principles of agency law in holding that a new company was bound by an agreement. The Third Circuit noted that its review of the arbitrator's factual finding is not whether those findings were supported by the weight of the evidence, or even whether they were clearly erroneous. All that was required is some support in the record. When the Court finds some support, the inquiry is over.

In the same vein, in *News America Publications v. Local 103*, 918 F.2d 21 (3rd Cir. 1990, *no writ*), the Court held that there must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of the award, *citing NF&M Corp. v. United Steelworkers of America*, 524 F.2d 756 (3rd Cir. 1975, *no writ*). *See also UTU Local 1589 v. Suburban Transit Corp.*, 51 F.3rd 376 (3rd Cir. 1995, *no writ*).

The conflict is most clearly shown by a series of decisions within the Sixth Circuit involving this same company and a virtually identical CBA. In the first case, in the Middle District of Tennessee, Bruce Hardwood had discharged an employee who committed the offense of "being insubordinate," listed as serious in the

CBA. An arbitrator set aside the discharge because it was not for just cause. The district court set aside the award, acknowledging a conflict with the Eighth Circuit. *Carpenters v. Bruce Hardwood Floors*, 784 F.Supp. 1345 (DC MTenn 1992), *rev'd* 8 F.3d 1104 (6th Cir. 1993).

In the second case, in the Western District of Tennessee, an arbitrator found that a discharged employee was in fact guilty of one of the listed serious offenses, "sleeping on duty," but found that the discharge was not for just cause. The district court set aside the award. The Sixth Circuit, however, reversed, holding that the arbitrator could apply the "just cause" standard in the agreement. The Court also found that the earlier Middle District case was wrongly decided. *Bruce Hardwood Floors v. Carpenters*, 8

F.3d 1104 (6th Cir. 1993, *no writ*). In these cases, unlike the case at bar, the CBA specifically provided that discipline would be applied "in a fair and equal manner to all offenders" and the company would take into account "mitigating circumstances" but the differences are immaterial. *Id.* at 1105. Those provisions merely restated principles encompassed within "just cause" that would apply in their absence.

The question of an arbitrator's authority under CBA's requiring just cause for discharge and also listing dischargeable offenses is present under almost all CBA's. Almost all of the circuits have got the answer to that question right, applying the principles established by this Court. The Fifth and First Circuits have not. The number of

cases involving the issue on which the circuits are in conflict requires that this court resolve the conflict. It is essential to the maintenance of the grievance and arbitration system that has served so well to implement this nation's labor policy that the policy announced be followed in practice, not just in form.

This Court has denied *certiorari* in many of the circuit court cases in which this trend of conflict in the circuits has existed, presumably because in each case the principles enunciated by this Court have been ritually and correctly recited before being misapplied in a particular case. But when this occurs again and again, it is appropriate and indeed necessary that this Court grant review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

MARVIN MENAKER
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Lyndon Plaza
10925 Estate Lane Suite 215
Dallas TX 75238
214/340-7788
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of JULY, 1997, a true and correct copy of the foregoing Petition for Writ of Certiorari was sent to Mr. Edward Bograd, Blair Conaway Bograd & Martin, P.A., 221 South Tryon Street, Charlotte NC 28202-3247, via regular mail.

MARVIN MENAKER

APPENDIX A

IN THE MATTER OF THE ARBITRATION BETWEEN

BRUCE HARDWOOD FLOORS
A TRIANGLE PACIFIC COMPANY
Center, Texas

and

FMCS No. 95-9822
Sheila Dixon,
Grievant

LOCAL UNION 2713
SOUTHERN COUNCIL OF INDUSTRIAL WORKERS
chartered by

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

APPEARANCES:

For the Company:

Edward Bograd, Esq.
Blair Conaway Bograd & Martin, P.A.
Attorneys at Law
221 South Tryon Street
Charlotte, North Carolina 28202-3247

For the Union:

Ed Jenkins
Council Representative
Southern Council of Industrial Workers
2737 N. Garland Road #15
Garland, Texas 75040

INTRODUCTION:

Pursuant to the Collective Bargaining Agreement between the parties, effective November 1, 1993, Article 9, the

undersigned was selected as arbitrator to hear and render a decision in the above referenced grievance through the procedures of the Federal Mediation and conciliation Service.

Hearing was held in Center, Texas, on April 19, 1995. Both parties were represented by learned and capable counsel. The parties were given the opportunity to make opening statements, present evidence and exhibits, present and cross examine witnesses and make closing arguments.

Initially, the parties stipulated that there was no question concerning the arbitrability of the grievance and that the grievance was properly before the arbitrator for a decision.

At the close of the hearing the parties requested and were granted time in which to file post hearing briefs. Both parties briefs were timely received by the Arbitrator, thus closing the file.

ISSUE:

Was the Grievant, Sheila Dixon, discharged for just cause? if not, what is the remedy?

BACKGROUND:

The facts in the instant case are not in dispute. The Company manufactures hardwood flooring at its Center, Texas, facility. The Grievant was employed by the Company on February 17, 1981, and at

the time of her discharge on January 14, 1995, was working on a production line as a Dryer Tailer/Grader in the Veneer Department.

During her tenure with the Company, the Grievant served as a Shop Steward. She had received oral warnings for minor violations of Company work rules over the years, but never received further progressive discipline until her discharge.

When she arrived home from work on Thursday, January 12, 1995, she discovered that her electricity had been turned off. Since she did not have the money to pay the bill the first thing the following day, she had to wait until she was paid. She was paid at lunch time on Friday, January 13, 1995, and decided to pay the electric bill after she got off work.

During her morning break on January 13, 1995, the Grievant called the Electric Company. She was informed that the bill must be paid no later than noon that day in order for the power to be turned back on for the weekend. She then went to her supervisor, Mr. Gary Henderson, at about 11:00 AM and requested time off for personal reasons. She requested about one hour off to take care of personal business.

When Mr. Henderson pressed her for more details, she told him that she needed to take her daughter her truck so she could use it to take her daughter to the doctor. She stated that her daughter would drive

her back to work. Mr. Henderson advised the Grievant that he would look into the matter and get back to her.

Shortly after the Grievant's lunch break, Mr. Henderson advised her that he had received approval to let her off, but that it would be an unexcused absence. According to the Company's published Attendance Policy, the Grievant understood that her time off would be an unexcused absence. The Grievant punched out, left the plant, went to the Electric Company and paid her bill. About forty-five minutes later she returned to work. Upon her return, she was seen driving her truck alone instead of with her daughter. Also, during her absence Mr. Henderson was advised by the Grievant's fellow employees that the reason she gave him for leaving the plant was not, in fact, the truth. Based on these facts, the Company decided that the Grievant had lied about her reasons for wanting time off from work.

On Saturday, January 14, 1995, the Grievant reported for work and discovered that her time card was not in the rack. She then was advised that she had been discharged.

When questioned about her reason for not telling the Company the truth about whey she needed time off from work on January 13, 1995, the Grievant testified that she was: Embarrassed about the situation and; She was concerned, that even if she was honest the Company would not let her off. Because of these concerns, she fabricated her story.

Mr. Henderson conferred with his supervisor, Mr. Larry Pryor, and the personnel Manager, Mr. Charles Chandler, before making a decision. In turn, Mr. Chandler conferred with the Plant Manager, Mr. Fred Burkhardt. Later, during the evening of January 13, 1995, Mr. Chandler advised Mr. Henderson that if the Grievant falsified the reason for getting the time off she was to be terminated the following morning for obtaining a leave from her job under false pretenses. In his Termination Letter, dated 1-14-95, Mr. Henderson stated in part:

> "I told Sheila that she was Terminated, effective, immediately, on the grounds of obtaining a leave from her job under false pretenses."

The instance [sic] grievance was timely filed on 1-16-95, and, as remedy, requests:

> "I want my job back based on an unjust discharge. I want [sic] made whole for the time I am off."

OPINION:

The pertinent provisions of the Collective Bargaining Agreement read:

ARTICLE 4
SENIORITY

* * * * *

Section 6 - Loss of Seniority

A. An employee shall lose all seniority rights under the following circumstances:

1. He resigns.
2. He is discharged for just cause.
3. He is absent from work for three (3) days without informing his immediate supervisor and giving a satisfactory reasons for such absence.
4. He has been laid off and subsequently refuses offered re-employment by the Company or fails to report for work within three (3) days after notification at his last known address or phone number.
5. His layoff extends for more than one (1) year.
6. He does not return to work after expiration of an approved leave of absence as set forth in Article 6, Section 3(c).
7. He obtains leave of absence under false pretenses.
8. He takes employment elsewhere during a leave of absence, without express prior written approval from the Company.

B. An employee possessing seniority rights under this Agreement who accepts

a position outside of the bargaining unit shall hold such seniority rights as he has accrued up to the time of his transfer. In the event such employee is returned to the bargaining unit, he shall be able to exercise such accrued seniority in accordance with Section 5 of this Article.

Such employee will not be required to withdraw his membership from the Union. However, he may request and be granted honorary withdrawal from the Union in accordance with its Constitution and Bylaws."

ARTICLE 24
DISCHARGE AND DISCIPLINE

Section 1

It is acknowledged that the company has the right and duty to maintain discipline, including the enforcement of safety and other plant rules, since it is responsible for the efficient operation of the business. The Company expressly has the right to discipline and discharge employees for just cause.

Section 2

The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less sever [sic] discipline.

(a) An employee will be discharge [sic] immediately without prior warning for the following or similar reasons:

(1) Smoking in non-smoking areas.
(2) Negligent damage to property of the company or of another employee.
(3) Disorderly conduct.
(4) Serious violation of safety rules or instructions.
(5) Participating in or originating practical jokes or pranks which might result in serious accidents.
(6) Sleeping on duty.
(7) Reporting for work under the influence of or bringing intoxicants or narcotics into the plant or their use or consumption in the plant, or reporting for work in a physical condition making it unsafe for the employee or other employees.
(8) Being insubordinate or disobedient.
(9) Intentional damage to property of the Company or an employee.
(10) Offering or taking a bribe of any kind in connection with work.
(11) Sabotage.
(12) Absent for three (3) consecutive working days

without notifying the Company.

(13) Being the aggressor in a fight on company property.

(14) Theft of property of the company or any employee.

(15) Punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports.

(16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.

(17) Refusal to permit inspection by plant guards of objects brought into or taken out of the plant.

(18) Failure or refusal to do assigned work.

(19) Possession of firearms, weapons or explosives on Company property.

(20) Leaving the plant or leaving the employee's assigned work area during working time without the permission of the department supervisor (working time does not include the unpaid lunch break).

Any employee who is suspected of violating a rule for which the penalty is immediate discharge may be suspended

without pay pending investigation of the circumstances. In the event the employee is found to be totally innocent of any offense he or she will be reinstated with pay.

(b) An employee will be subject to progressive discipline for the following or similar reasons:

(1) Absenteeism.
(2) Tardiness.
(3) Inefficiency or poor work performance.
(4) Abuse of rest periods and lunch periods.
(5) Neglecting duty or failing to maintain work standards.

Section 3

In the case of offenses where the application of progressive discipline would be appropriate as set forth in (b) above, the Company shall endeavor to adhere to the following order:

(a) Verbal warning with written record of warning for the first incident.
(b) Written warning for the second incident.
(c) Disciplinary suspension of three(3) unpaid days for the third incident.
(d) Discharge for the fourth incident.

In agreeing to the foregoing, however, the Company does not intend to waive the exercise of its right to discipline or discharge without following such order in

any case where it determines that the seriousness of the particular offense involved warrants discipline of a different order.

Section 4

The employee shall be informed of the disciplinary action within five (5) working days after the violation is known to the Company.

Section 5

All disciplinary action taken by the Company shall remain in effect and be retained in an employee's file for a period of twelve (12) months. Such disciplinary action will not thereafter be considered in implementing further progressive disciplinary action.

Section 6

The Company retains the unlimited right to promulgate, revise or modify plant safety and work rules governing order and discipline in the plant. Said rules will not become effective until the Company has discussed these rules or changes thereto with the local Union President and/or the Chief Steward and the rules have been posted on the bulletin boards for a period of five (5) working days. If the Union does not agree with the reasonableness of the rules or changes, it shall have five (5) working days from the date of the meeting with the Company to protest any possible enforcement by filing a grievance specifying the rules if it [sic] believes to be unreasonable. Failure to file a timely grievance within the said five(5) day period will constitute a waiver of any

right to challenge the reasonableness of the rule thereafter.

Section 7

In the event the Company suspends an employee prior to quitting time that day will be counted as the first day of suspension."

The Company, in their apparent "rush to judgment", concluded that the Grievant's conduct violated the terms of the Collective Bargaining Agreement, and; that they had "just cause" for terminating her.

Arbitrable standards for just cause discharge were established long ago by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359, 363-65 (1966). In concise form these criteria are as follows:

1. The employee must be forewarned.
2. Employer's position with respect to employee's conduct was reasonable.
3. Employer investigated before discharge.
4. Investigation was fair.
5. Substantial evidence supports the charge against the employee.
6. There was no discrimination.
7. The degree of discipline was reasonably related to the nature of the offense and the employee's past record.

Misco, Inc., 89 LA 137, 144 (Fox 1983).

In Misco, Inc., as in numerous preceding awards, the Arbitrator relied upon those criteria in sustaining a grievant's challenge to discharge on just cause grounds. The Misco, Inc., award was enforced by the United States Supreme Court in United Paperworker's International Union v. Misco, Inc., 484 U.S. 29 (1987). A "no" answer to anyone [sic] or more of the above criteria means just cause for discharge did not exist. Enterprise Wire Co., 46 LA at 362. A single "no" answer means that the Company's decision "contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action.....[and] constituted an abuse of managerial discretion warranting the Arbitrator to substitute his judgement [sic] for that of the employer." Id. at 363. The Union maintains that the instant record warrants a "no" answer to one or more of the above criteria. Therefore, the Grievant was not discharged for just cause and should be reinstated, and made whole.

The Company's position that the Grievant's conduct violated the current Collective Bargaining Agreement, especially Article 4, Section 6(7), is, to say the least, "unreasonable". [sic] The same applies to the Company's attempt to apply Article 24, Section 2(15 & 16).

The Grievant's conduct was into such that demands the supreme industrial penalty of immediate discharge. The

Company wrongfully attempted to apply the referenced provisions of the Collective Bargaining Agreement to the Grievant's conduct. The parties negotiated a progressive discipline policy which the Company failed to follow.

Certainly, the Grievant was guilty of using poor judgment [sic]. The Union president, Mr. Howard McClung, testified that he was not aware of any other employee that has been discharged for the same reasons as the Grievant. He testified that he was not aware that employees could be discharged for being dishonest when verbally requesting time off from work. Also, he testified that he asked Company management: "If the Grievant had been honest, would they have let her off?" The Company's answer was "no". [sic]

Considering the evidence adduced at the arbitration hearing, and considering the presentations made by the parties in their post hearing briefs, the Arbitrator has adequate reason to substitute his judgment [sic] for that of Company's management.

The discipline imposed is reduced to a ten (10) working day suspension.

AWARD

The discipline imposed is reduced to a ten (10) working days suspension. The Grievant is to be returned to her former position with full seniority and all other rights, that she is entitled to under the

terms of the Collective Bargaining Agreement. The Grievant is to be made whole for any loss in excess of the ten (10) working day suspension.

The Union's request for interest on the back pay is denied.

s/Don J. Harr, Arbitrator

Dated at Oklahoma City, Oklahoma, on August 1, 1995.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

FILED
U.S. District Court
Eastern District of Texas

February 21, 1996

David J. Maland, Clerk
By Deputy s/Barbara S. Th__

BRUCE HARDWOOD FLOORS, a division of Triangle Pacific Corp.	§	
V.	§	CIVIL ACTION NO.9:95CV295
UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2714	§	
	§	

MEMORANDUM AND ORDER

Before the Court are the Motions for Summary judgment filed by both parties in this case. For reasons given below, the Court finds that he Motion for Summary judgment to enforce the arbitrator's award is well taken and should be GRANTED while the motion by Bruce Hardwood Floors for Summary Judgment to vacate the arbitrator's award should be DENIED.

BACKGROUND

On August 24, 1995, Plaintiff, Bruce Hardwood Floors, a division of Triangle Pacific Corporation ("Bruce") filed a

complaint seeking to vacate an arbitrator's award. It was assigned cause number 9:95 CV 295. On August 28, 1995, the Defendant UBC, Southern Council of Industrial Workers ("UBC"), filed an action to enforce the same arbitrator's award. That case was assigned cause number 9:95 CV 309. On October 13, 1995, the Court granted the motion to consolidate 9:95 CV 309 into 9:95 CV 295 for all purposes.

The dispute arises out of the following facts, which are undisputed. Bruce is a company that manufactures hardwood flooring at its facility in Center, Texas. Former employee, Sheila Dixon, was employed by Bruce from February 17, 1981, until the time of her discharge on January 14, 1995. This discharge was the basis for the grievance filed and submitted for arbitration under the agreement between Bruce and UBC, which was in effect during the relevant time. During her employment at Bruce, Ms. dixon had served as Shop Steward and had received only oral warnings for minor violations of company work rules over the years. She had never received any further progressive discipline until her discharge.

When returning home from work on Thursday, January 12, 1995, Ms. Dixon discovered that her electricity had been turned off. She had no money to pay the bill but was to be paid the next day at lunch time. She decided she would pay the bill after work the next day, Friday.

During her morning break on Friday, Ms.

Dixon called the electric company and was told that she had to pay the bill by noon that day or her electricity would not be turned on for that weekend. Ms. Dixon then approached her supervisor, Mr. Henderson, at about 11:00 a.m. and requested to take time some time off for personal reasons. She requested one hour off to take care of personal business. When Mr. Henderson pressed for more details, Ms. Dixon told him she needed to take her daughter her truck so she could use it to take her daughter to the doctor. She stated that her daughter would drive her back to work. Mr. Henderson advised Ms. Dixon that he would look into the matter and get back to her. Shortly after her lunch break, Mr. Henderson advised her that he had received approval to let her off, but it would be an unexcused absence. Ms. Dixon punched out, went to pay her electric bill, and returned to work about 45 minutes later. Upon her return, she was observed driving her truck rather than her daughter. Fellow employees had advised Henderson during her absence that she had not given the true reason for needing to leave work.

The next day, Saturday, January 14, 1995, when Ms. Dixon reported to work, she discovered that her time card was not in the rack. She was then advised that she had been discharged. When questioned about her reason for not telling the company the truth about her reason for needing time off from work, she said she was embarrassed by the situation and she was concerned that had she given the true reason, she might not have been let off.

After conferring with his superiors, Mr. Henderson terminated Ms. Dixon, effective immediately, on the grounds of obtaining leave from her job under false pretenses.

Ms. Dixon filed a grievance, based upon an unjust discharge, requesting her job back and to be made whole for her time off.

Pursuant to the collective bargaining agreement, the grievance was arbitrated on April 19, 1995, by Arbitrator Don J. Harr. The parties stipulated that the grievance was subject to arbitration. The issue before the Arbitrator was "Was the Grievant, Sheila Dixon, discharged for just cause? If not, what is the remedy?"

On August 1, 1995, Arbitrator Harr's Award was rendered that the Award was: "The discipline imposed is reduced to a ten (10) working day suspension. The grievant is to be returned to her former position with full seniority and all other rights, (sic) that she is entitled to under the terms of the collective bargaining agreement. The Grievant is to be made whole for any loss in excess of the ten (10) working days suspension. ***The Union's request for interest on the back pay is denied."[1] The Arbitrator found that the company's position that Grievant's conduct violated the current Collective Bargaining Agreement was "unreasonable." Specifically and in particular, the Arbitrator found that the

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[1] Defendant's Exhibit No.2,pages 8 & 9.

company's attempt to characterize Grievant's behavior as violating Article 4, Section 6(7) and Article 24, Section 2(15 & 16), is "to say the least, 'unreasonable'." The Arbitrator found the Grievant "was guilty of using poor judgment."

The company has refused to comply with the Arbitration Award and reinstated Ms. Dixon.

SUMMARY JUDGMENT

Summary judgment is appropriate when the movant is able to demonstrate that the pleadings, affidavits and other evidence available to the Court establish that the are no genuine issues of material fact. Fed.R.Civ.P. 56(c); see generally 10 & 10A Wright, Miller & Kane, Federal Practice and Procedure I 2711-2742. The current standards for reviewing a motion for summary judgment were established by the U.S. Supreme Court's 1986 trilogy of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

DISCUSSION

The courts have limited power to review arbitration awards. "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to

accept." *United Paperworkers International v. Misco*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 91987). So long as the arbitrator's award "draws its essence from the collective bargaining agreement" and is not merely "his own brand of industrial justice," the award is legitimate. *Id.* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960).

The only relevant factual inquires (sic) in a case involving the enforcement of an arbitrator's award drew its essence from the collective bargaining agreement. *Int'l Association of Machinists and Aerospace Workers v. Texas Steel Co.*, 538 F.2d 116, 119 (5th Cir. 1976), *cert. denied* 429 U.S. 1095 (1977).

The parties stipulate that the dispute was arbitrable. However, Plaintiff contends that the arbitrator exceeded his authority and rendered an award which was outside the essence of the collective bargaining agreement and was implementing "his own brand of industrial justice." Bruce further contends that the finding by the arbitrator that Ms. Dixon exercised poor judgment is tantamount to a finding of dishonestly (sic) which is just cause for immediate dismissal pursuant to Article 24, Section 1 of the agreement which provides that "[t]he Company expressly has the right to discipline and discharge employees for just cause."

The Court has reviewed the collective bargaining agreement in question and notes that ARticle 9, Section 2 provides, in

part, that [t]he written decision of the arbitrator shall be final and binding on all parties." Article 1 recognizes the Company's responsibility and right to discharge for just cause.

The Court notes, that the agreement provides for a progressive discipline procedure for various infractions, such as tardiness, and enumerates the offenses for which immediate discharge, without prior warning, will be the penalty. Article 24 "DISCHARGE AND DISCIPLINE" states as follows: "An employee will be discharged immediately without prior warning for the following *or similar*reasons." (Emphasis added.) Then twenty specific infractions are listed, such as (4) "serious violation of safety rules or instructions" or (13) "being the aggressor in a fight on company property." In these enumerated offenses are (15) "punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports and (16) "stealing, immoral conduct, or any action the Company premises intended to destroy property or inflict bodily injury." At arbitration, Bruce took the position that Grievant's conduct violation (15) and (16). Bruce also took the position that the conduct justified immediate loss of seniority under Article 4, Section 6(7) of the collective bargaining agreement which punishes one who "obtains leave of absence under false pretenses." A leave of absence, while not precisely defined, however, is referred to as being of a duration of two weeks or six weeks and is not a matter of minutes.

After review of the agreement and the arbitrator's award, the Court is satisfied that the arbitrator confined his decision and remedy to the interpretation and application of the collective bargaining agreement. He did provide an award which was within the essence of the collective bargaining agreement. The Court agrees with the ARbitrator that Plaintiff's position that Ms. Dixon's conduct violated Article 4, Section 6(7) and Article 24, Section 2(15 & 16) was unreasonable.

ATTORNEY'S FEES

The Fifth Circuit has authorized the award of attorney's fees where it is determined that a party has refused to abide by an arbitration award without justification. *Int'l Ass. of Machinists v. Texas Steel Co.*, 639 F.2d 279 (5th Cir. 1981). The Court finds that the refusal of Bruce Hardwood Floors to abide by the arbitration award in this case was without justification.

Based upon the foregoing,

IT IS ORDERED the Plaintiff's Motion for Summary Judgment to vacate Arbitrators Award is DENIED in all things.

IT IS ORDERED that Defendant's Motion for Summary Judgment is GRANTED in all things.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff, Bruce Hardwood Floors, a Division of Triangle Pacific

Corporation, abide by the remedy set out in the Award of Arbitrator Don J. Harr, returning Grievant, Sheila Dixon, to her former position with full seniority and all other rights that she is entitled to under the terms of the collective bargaining agreement, and making her whole for any losses over the ten (10) working day suspension;

IT IS FURTHER ORDERED that Plaintiff pay Defendant for reasonable attorney's fees in prosecuting this action.

SIGNED this 20th day of February, 1996.

s/ JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BRUCE HARDWOOD FLOORS, a DIVISION OF TRIANGLE PACIFIC CORPORATION	§	
Employer,	§	
VS.	§	CIVIL ACTION NO. CA9:95-CV-295
UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,	§	
Union.	§	

JUDGMENT

Pursuant to the Court's Memorandum and Order granting Defendant UBC, Southern Council of Industrial Workers, Local Union No. 2713's Motion for Summary judgment, and overruling Plaintiff's Motion for Summary Judgment, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff Bruce Hardwood Floors, a division of Triangle Pacific Corp., abide by the Award of Arbitrator Don J. Harr, dated August 1, 1995, returning Grievant Sheila Dixon, to her former position with full seniority and all other rights that she is entitled to under the terms of the collective bargaining agreement, making her whole for any losses over the ten (10) working day suspension;

IT IS FURTHER ORDERED that Plaintiff pay Defendant UBC, Southern Council of Industrial Workers, Local 2713, reasonable attorney's fees in the amount of $4,578.67,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is to draw interest at the current legal rate of 4.89%, beginning on the thirty-first day after Judgment was entered.

SIGNED THIS 20 day of March, 1996.

s/JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

BRUCE HARDWOOD FLOORS v. UBC, INDUS. WORK.

NO. 2713

BRUCE HARDWOOD FLOORS, DIVISION OF TRIANGLE PACIFIC CORPORATION, Plaintiff-Appellant,

v.

UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713, Defendant-Appellee.

UBC, SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713, Plaintiff-Appellee,

v.

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION, Defendant-Appellant.

No. 96-40279.

United States Court of Appeals,
Fifth Circuit.

Jan. 21, 1997.

Appeal from the United States District Court for the Eastern District of Texas.

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Plaintiff Bruce Hardwood Floors ("Bruce") appeals the district court's grant of summary judgment enforcing an arbitration award in favor of Defendant UBC, Southern Council of Industrial Workers, Local Union No. 2713 ("the Union") and the court's award of attorneys' fees to the Union. We reverse the district court's decisions on both issues.

I

Sheila Dixon, a Dryer Tailer/Grader on a production line in Bruce's Veneer Department, asked her supervisor for leave from work to take her truck to her daughter who needed it to go to the doctor. Dixon's supervisor approved her request. However, while Dixon was absent from work, other employees informed her supervisor that Dixon actually needed the time off to pay an overdue electric bill. When questioned by her supervisor the next day about her reasons for needing the absence from work, Dixon admitted that she had fabricated the story about her daughter's doctor appointment. After conferring

with his own supervisor, the plant's personnel manager, and the plant manager, Dixon's supervisor discharged Dixon for obtaining the time off from work under false pretenses.

Dixon thereafter filed a grievance contesting her termination. Her grievance was processed in accordance with the four-step procedure in the parties' collective bargaining agreement ("CBA"). When Dixon's termination could not be resolved through the grievance procedure, the Union submitted the dispute to arbitration.

The arbitrator held that Bruce should have applied progressive discipline provisions of the CBA, rather than discharge provisions.[1]

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1. The pertinent discharge and progressive discipline provisions of the CBA are as follows:

Article 24, Section 2. The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less severe discipline.

(a) An employee will be discharged immediately without prior warning for the following or similar reasons:

He concluded that Bruce's contention that Dixon's conduct warranted discharge under the CBA was "unreasonable," but

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. . . . . .

(16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.

. . . . . .

(b) An employee will be subject to progressive discipline for the following or similar reasons:

(1) Absenteeism. (3) Inefficiency or poor work performance.

(2) Tardiness. (4) Abuse of rest periods and lunch periods.

(5) Neglecting duty or failing to maintain work standards.

Section 3. In the case of offenses where the application of progressive discipline would be appropriate as set forth in (b) above, the Company shall endeavor to adhere to the following order:

(a) Verbal warning with written record of warning for the first incident.

(b) Written warning for the second incident.

(c) Disciplinary suspension of three (3) unpaid days for the third incident.

(d) Discharge for the fourth incident.

In agreeing to the foregoing, however, the Company does not intend to waive the exercise of its right to discipline or discharge without following such order in any case where it determines that the seriousness of the particular offense involved warrants discipline of a different order.

found that Dixon had "fabricated her story."[2] The arbitrator reinstated Dixon with full seniority and back pay and imposed a ten-day suspension from work.

Bruce then filed a complaint in district court seeking vacatur of the arbitration award. The Union subsequently filed a complaint seeking enforcement of the award. The district court consolidated the actions and the parties filed cross-motions for summary judgment. The district court granted the Union's motion and denied Bruce's motion,

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2. Specifically, the arbitrator concluded:

> The Grievant's conduct was not such that demands the supreme industrial penalty of immediate discharge. The Company wrongfully attempted to apply the referenced provisions of the Collective Bargaining Agreement to the Grievant's conduct. The parties negotiated a progressive discipline policy which the Company failed to follow.
>
> Considering the evidence adduced at the arbitration hearing, and considering the presentations made by the parties in their post hearing briefs, the Arbitrator has adequate reason to substitute his judgement [sic] for that of Company's management.

thereby enforcing the arbitration award.[3] The district court also awarded the Union attorneys' fees. Bruce appeals.

II

[1,2] Bruce argues that the arbitrator improperly ignored the terms of the parties' CBA and that the district court should therefore have vacated the arbitration award. Where a party appeals a grant of summary judgment in a suit to vacate an arbitration award, we review the district court's ruling *de novo*. *Houston Lighting & Power Co. v. International Bhd. of Elec. Workers, Local Union No. 66,* 71 F.3d 179, 181 (5th Cir. 1995), *cert. denied*, -----U.S.------, 117 S.Ct. 52, 136 L.Ed.2d 16 (1996). As long as the arbitrator's decision draws its essence from the collective bargaining agreement and the arbitrator is not fashioning his own brand of industrial justice,

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3. In granting the Union's motion for summary judgment to enforce the arbitration award, the district court found that "the arbitrator confined his decision and remedy to the interpretation and application of the collective bargaining agreement" and that the arbitrator "provide[d] an award which was within the essence of the collective bargaining agreement."

we will decline to vacate the award. *Id.* at 182. In applying the "essence" test, we have stated that an arbitration award "must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. . . . [T]he award must, in some logical way, be derived from the wording or purpose of the contract." *Executone Info. Sys., Inc. v. Davis*, 26 F.3d 1314, 1325 (5th Cir.1994) (citation omitted).

[3,4] Although we accord an arbitrator's decision considerable deference regarding the merits of the controversy, the CBA circumscribes his jurisdiction. *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir.1989), *cert. denied*, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). Where the arbitrator exceeds the express limitations of his contractual mandate, judicial deference ends and vacatur or modification of the award is an appropriate remedy. *Id.*

[5] After reviewing both the CBA and the arbitration

award, we conclude that the award is not "derived from the wording or purpose of the contract." *Executone*, 26 F.3d at 1325. Article 9, § 3 of the CBA binds an arbitrator to the terms of the contract. *See id.* ("No arbitrator shall have authority to add to, amend or depart from the terms of this written Agreement. . . ."). The arbitrator found, based on Dixon's own admission, that Dixon lied to obtain time off from work. Lying is specifically covered by Article 24, § 2(a) of the CBA, which states that an employee will be discharged immediately for engaging in immoral conduct.[4] In refusing to apply this provision, the arbitrator exceeded the express limitations of his contractual mandate.[5]

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4. The dissent criticizes us for interpreting the term "immoral conduct." We do not. By definition, lying is immoral conduct--that is, it is inconsistent with principles of morality. *See* BLACK'S LAW DICTIONARY 751 (6th Ed.1990).

5. The arbitrator concluded that Bruce should have applied the CBA's progressive discipline policy to Dixon's conduct, but did not specify which of the five enumerated progressive discipline offenses incorporated Dixon's lie. Likewise,

[6] The arbitration award is further undermined by the penalty imposed. Nowhere does the CBA provide for a penalty of a ten-day suspension from work. Although the Supreme Court has stated that "[n]ormally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct," *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41, 108 S.Ct. 364, 373, 98 L.Ed.2d 286 (1987), the Court clarified that "[t]he parties, of course, may limit the discretion of the arbitrator in this respect. . . ." *Id.* By so doing, it is possible to vest in the employer complete

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though the Union urges that Dixon's conduct deserves progressive discipline because it is similar tot he listed progressive discipline offenses, it also fails to specify which of the offences implicates lying. For our part, we discern no similarity between lying and absenteeism, tardiness, inefficiency or poor work performance, abuse of rest periods and lunch periods, or neglect of duty or failure to maintain work standards. The plain language of the progressive discipline policy simply does not support a finding that the policy applies to lying, particularly in light of the clear applicability of the discharge provisions to Dixon's conduct.

discretion over terminations which the arbitrator is not free to usurp. *Delta Queen*, 889 F.2d at 602.

As noted, the CBA in this case prohibits an arbitrator from adding to, amending or departing from the terms of the agreement. Hence, once the arbitrator found that Dixon fabricated her story, he was bound to impose the penalty provided by the CBA for that conduct. *See Delta Queen*, 889 F.2d at 604 ("If a collective bargaining agreement defines 'proper cause' to include a non-exhaustive list of offenses, an arbitrator cannot ignore the natural consequence of his finding that a listed offense was committed."). In fashioning a remedy not contained in the CBA, despite finding that Dixon committed an offense covered by the CBA, the arbitrator exceeded his contractual authority by adding to, amending and/or departing from the terms of the agreement. As a result, we vacate the arbitration award. *See Houston Lighting & Power Co.*, 71 F.3d at 179 ("[T]he rule in this circuit, and the emerging trend among other courts of appeals, is that arbitrar action contrary to

express contractual provisions will not be respected."). Thus, we reverse the district court's grant of summary judgment in favor of the Union and reinstate Dixon's discharge. *See Container Prods., Inc. v. United Steelworkers of Am., and its Local 5651*, 873 F.2d 818, 820 (5th Cir.1989) (affirming district court order vacating remedy imposed by arbitrator and reinstating discharge).

III

[7-9] Bruce also contends that the district court abused its discretion in awarding the Union attorneys' fees. We review an award of attorneys' fees for an abuse of discretion. *International Union of Elec., Radio and Mach. Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 893 (5th Cir.1983), *cert. denied*, 466 U.S. 928, 104 S.Ct. 1711, 80 L.Ed.2d 184 (1984). An award of attorneys' fees is permitted when a party has refused to abide by an arbitration decision "without justification." *International Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co. ("Texas Steel II")*, 639

F.2d 279, 283 (5th Cir. 1981).

Because we have concluded that the arbitrator exceeded his contractual authority, we do not find that Bruce's refusal to abide by the arbitration decision was without justification. *See id.* at 283-84 (explaining that in cases where arbitration award exceeds power conferred upon arbitrator, challenge is proper and not without justification). Hence, we reverse the district court's award of attorneys' fees to the Union.

IV

For the foregoing reasons, we REVERSE the district court's grant of summary judgment in favor of the Union, VACATE the arbitration award and reinstate Dixon's discharge. In addition, we REVERSE the district court's award of attorneys' fees to the Union.

BENAVIDES, Circuit Judge, dissenting:

I dissent. The majority substitutes its own interpretation of the collective bargaining agreement ("CBA") for the arbitrator's interpretation. In doing so, it disregards

fundamental Supreme Court precedent setting forth the deferential standard for reviewing arbitration awards. An arbitration award can be overturned only if it fails to draw its essence from the collective bargaining agreement. *See United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). A corollary of this principle is that we cannot overturn an arbitration award even if "the arbitrator misread the contract." *United Paperworkers Int'l Union AFL--CIO v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 370, 98 L.Ed.2d 286 (1987). "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38-39, 108 S.Ct. At 371.

The arbitrator in this case construed the CBA in light of the evidence before him and determined that the company's decision to terminate Dixon involved an unreasonable

construction of the CBA and that the company should have imposed progressive discipline instead. The arbitrator's conclusions are rationally inferable from the CBA. No more is required. Accordingly, I would affirm the judgment of the district court upholding the award.

The facts before the arbitrator are somewhat more textured than the court's opinion reflects. Dixon's termination arose from an unpaid 45-minute absence from work. Her electricity had been turned off because she had failed to pay her bill. She planned to pay the bill at the end of the work day on Friday, after she received her paycheck. But during her morning break that day, she discovered that unless she paid the bill by noon, she would have no electricity for the entire weekend. That morning, she asked her supervisor, Gary Henderson, for an hour off for a personal reason. Henderson demanded details about why she needed the time. Instead of telling him the undoubtedly embarrassing truth (that her electricity had been shut off because she had failed to pay her

bill), she told him that she needed to take her truck to her daughter who had a doctor's appointment. Henderson told her that she could leave, but that it would be an "unexcused absence." She clocked out, went to pay the electricity bill, and returned within 45 minutes. In the meantime, Dixon's co-workers told her supervisor that she had fabricated the reason for leaving work. When Dixon returned to work the next day, her time card was missing, and she was told that she had been discharged. At the time of Dixon's discharge, the company stated that it was terminating her for obtaining a leave of absence under false pretenses.[6]

Neither the CBA's list of dischargeable offenses nor the list of offenses for which progressive discipline will be

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6. "Obtaining a leave of absence under false pretense" is not listed as a dischargeable offense under the CBA, but rather as a ground for loss of seniority. Thus, the arbitrator reasonably concluded that the reason for termination given by the company at the time of Dixon's discharge did not provide just cause for her termination. Although the company continues on appeal to assert this as a just cause for termination the majority does not rest its opinion on this provision.

imposed specifically covers Dixon's misconduct. Both lists are non-exhaustive and allow punishment of "similar offenses" under their terms. It was the arbitrator's task to determine whether her conduct was more closely analogous to a dischargeable offense or a progressive discipline offense. The arbitrator evidently decided that Dixon's misconduct in fabricating a story to get a 45-minute unpaid break to pay her electricity bill was more akin to a progressive discipline offense, such as absenteeism or "abuse of rest period and lunch periods," than to any dischargeable offense under the CBA. Thus, the arbitrator determined that the company should have followed its progressive discipline policy rather than discharging Dixon. In reaching this conclusion, the arbitrator necessarily interpreted the CBA. It is not our business to overturn that interpretation, even if we would have decided the matter differently.

The arbitrator concluded that the company's attempt to characterize Dixon's conduct as "immoral conduct" within the

meaning of Article 24, Section 2(a)(16) of the CBA was unreasonable. That section allows the company to terminate employees immediately for "stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury." The majority erroneously states that "lying" is "specifically covered" by this provision and conc ludes that this provision is dispositive. Lying is not, however, specifically listed in this provision, nor is immoral conduct expressly defined by the CBA to include lying. Instead the majority's conclusion requires an inferential step, that any lie is "immoral conduct" justifying immediate termination within the meaning of the CBA. In other words, the majority *interprets* the term "immoral conduct" and comes to a conclusion different from that reached by the arbitrator. That is not the court's proper role. In reviewing the arbitrator's construction of the phrase "immoral conduct," the issue is not what we believe to be moral or immoral conduct in the philosophical sense. The issue before the arbitrator was whether Dixon's conduct rose to

the level of "immoral conduct" as that term is used in the CBA.

The arbitrator evidently concluded that Dixon's fabrication, though it demonstrated "poor judgment," did not rise to the level of "immoral conduct" within the meaning of this offense. An arbitrator has discretion to decide whether particular conduct constitutes a dischargeable offense within the meaning of a CBA, as the First Circuit aptly explained in *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir.1988) (holding that where the arbitrator found that an employee committed an offense listed as a ground for discharge, he lacked discretion to order the employee's reinstatement). The CBA in *Georgia-Pacific* provided that "dishonesty" was an offense for which an employee could be discharged. *Id.* at 945. As the court explained, "It is . . . up to an arbitrator to decide whether a given pattern of conduct amounts to dishonesty. For example, an arbitrator may decide that stealing a company pencil does not amount to dishonesty for purposes of immediate discharge." *Id.*

at 945 n. 2. Similarly, in this case, it was up to the arbitrator to decide whether Dixon's conduct rose to the level of "immoral conduct" for the purposes of immediate discharge. I fail to see how the arbitrator could be compelled to find that Dixon's action was immoral conduct, especially when the CBA itself specifically lists "obtaining a leave of absence under false pretenses" as a ground for loss of seniority, but not as a ground for discharge.

The arbitrator's apparent interpretation of "immoral conduct" also draws support from the context in which the phrase appears. It is a fundamental canon of construction that a word is known by its company. Applying this principle, "immoral conduct" should be construed in relation to the other offenses listed with it in Section 2(a)(16): "stealing" and "any act on the Company premises intended to destroy property or inflict bodily injury." The arbitrator could have concluded that immoral conduct in this context does not encompass any act that violates the Golden Rule, but only conduct that rises to the

serious level of stealing or intentional infliction of property damage or personal injury. Although this court may not agree with the arbitrator's interpretation and indeed may be convinced that the interpretation was a "serious error," it may not overturn the award simply because it disagrees.

The company and the court rely heavily on *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599 (5th Cir.1989), *cert. denied*, 498 U.S. 853, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990). This case is easily distinguished from *Delta Queen*. In that case, the CBA expressly listed "carelessness" as a ground for discharge, and the arbitrator expressly found that the discharged riverboat captain was "grossly careless." *Id.* at 601. In that circumstance, we held that the arbitrator, having found that the riverboat captain had committed a dischargeable offense, was not free to ignore the terms of the CBA. If the arbitrator in this case had made an express finding that Dixon engaged in immoral conduct, then, of course, he could not ignore the terms of

Article 24, Section 2, which makes immoral conduct a dischargeable offense. But he made no such finding.

The majority further suggests that the fact that the remedy imposed by the arbitrator, a ten-day suspension, is not provided for by the CBA agreement somehow undermines the arbitrator's decision that the company lacked just cause to terminate Dixon. But appropriate discipline for the offense is a distinct question from whether the termination was with just cause. The parties' submission of two questions to the arbitrator ("Was the Grievant, Sheila Dixon, discharged for just cause? If not, what is the remedy?") underscores the separateness of the two inquiries. That the arbitrator imposed a harsher punishment on Dixon than would be available to the company under the CBA does not undermine the arbitrator's decision on the termination question. Further, it is difficult to see how the company can complain of the imposition of a punishment more severe than that which it would have been able to impose under the CBA's progressive discipline policy.

A three-day unpaid suspension is the most severe progressive discipline provided for by the CBA, short of termination. At oral argument, the company in essence conceded that if it lacked just cause to terminate Dixon, it does not seek a remand for the purpose of imposing a lesser punishment on Dixon under the CBA's progressive discipline policy.

The arbitrator was charged with deciding whether the company had just cause to discharge Dixon. To do so, he had to evaluate Dixon's particular conduct and determine whether that conduct fell within the CBA's discharge provision. He concluded that, plotted on a spectrum of bad behavior, Dixon's actions fell closer to absenteeism or abuse of a rest period than to stealing, immoral conduct, or intentional infliction of personal injury or property damage. Unlike the majority, I would not overturn the arbitrator's decision merely because I do not agree with its outcome. Clearly, his decision drew its essence from the CBA. I would affirm the judgment of the district court, including the award of attorney's fees. *See*

International Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co., 639 F.2d 279, 283 (5th Cir. Unit A 1981). The district court did not clearly err in concluding that the company's challenge to the arbitrator's award was "without justification."

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-40279

BRUCE HARDWOOD FLOORS, Division of Triangle Pacific Corporation
Plaintiff-Appellant

v.

UBC, Southern Council of Industrial Workers, Local Union No. 2713
Defendant-Appellee

****

UBC, Southern Council of Industrial Workers, Local Union No. 2713

Plaintiff-Appellee

v.

Bruce Hardwood Floors, A Division of Triangle Pacific Corporation

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Lufkin

ON PETITION FOR REHEARING

Before BARKSDALE, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT

s/Emilio M. Garza
United States Circuit Judge

APPENDIX E

LABOR AGREEMENT
by and between
BRUCE
HARDWOOD FLOORS
A Triangle Pacific Company
Center, Texas

and

LOCAL UNION 2713
SOUTHERN COUNCIL OF INDUSTRIAL WORKERS

chartered by

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO

for the period:
November 1, 1993
through
November 2, 1997

ARTICLE 4
SENIORITY

***

Section 6 Loss of Seniority A. An employee shall lose all seniority rights under the following circumstances:

1. He resigns.
2. He is discharged for just cause.
3. He is absent from work for three (3) days without informing his immediate supervisor and giving a satisfactory reason for such absence.
4. He has been laid off and subsequently refuses offered re-employment by the Company or fails to report for work within three (3) days after notification at his last known address or phone number.
5. His layoff extends for more than one (1) year.
6. He does not return to work after expiration of an approved leave of absence as set forth in Article 6, Section 3(c).
7. He obtains a leave of absence under false pretenses.
8. He takes employment elsewhere during a leave of absence, without express prior written approval from the Company.

ARTICLE 9
ARBITRATION

***

Section 2 The arbitrator shall conduct

a hearing at which the facts and arguments relating to the dispute shall be heard. The award shall be rendered promptly, and, unless agreed by the parties, not later than thirty (30) calendar days from the date of closing the hearing or the date for filing briefs, whichever is later, and no award shall be retroactive beyond the date on which the grievance occurred. The written decision of the arbitrator shall be final and binding on all parties....

ARTICLE 24
DISCHARGE AND DISCIPLINE

Section 1 It is acknowledged that the company has the right and duty to maintain discipline, including the enforcement of safety and other plant rules, since it is responsible for the efficient operation of the business. The Company expressly has the right to discipline and discharge employees for just cause.

Section 2 The Company will take action against an employee based upon conduct which warrants immediate discharge, or for other conduct, while less serious, which initially warrants less severe discipline.

(a)An employee will be discharged immediately without prior warning for the following or similar reasons:

(1) Smoking in non-smoking areas.
(2) Negligent damage to property of the company or of another employee.
(3) Disorderly conduct.

(4) Serious violation of safety rules or instructions.

(5) Participating in or originating practical jokes or pranks which might result in serious accidents.

(6) Sleeping on duty.

(7) Reporting for work under the influence of or bringing intoxicants or narcotics into the plant or their use or consumption in the plant, or reporting for work in a physical condition making it unsafe for the employee or other employees.

(8) Being insubordinate or disobedient.

(9) Intentional damage to property of the Company or an employee.

(10) Offering or taking a bribe of any kind in connection with work.

(11) Sabotage.

(12) Absent for three (3) consecutive working days without notifying the Company.

(13) Being the aggressor in a fight on company property.

(14) Theft of property of the Company or any employee.

(15) Punching another employee's time card or permitting another employee to punch your time card or willfully falsifying time cards or work reports.

(16) Stealing, immoral conduct, or any act on the Company premises intended to destroy property or inflict bodily injury.

(17) Refusal to permit inspection by plant guards of objects brought into or taken out of the plant.

(18) Failure or refusal to do assigned work.
(19) Possession of firearms, weapons or explosives on Company property.
(20) Leaving the plant or leaving the employee's assigned work area during working time without the permission of the department supervisor (working time does not include the unpaid lunch break).

Any employee who is suspected of violating a rule for which the penalty is immediate discharge may be suspended without pay pending investigation of the circumstances. In the event the employee is found to be totally innocent of any offense he or she will be reinstated with pay.

(b)An employee will be subject to progressive discipline for the following or similar reasons:

(1) Absenteeism.
(2) Tardiness.
(3) Inefficiency or poor work performance.
(4) Abuse of rest periods and lunch periods.
(5) Neglecting duty or failing to maintain work standards.

Section 3 In the case of offenses where the application of progressive discipline would be appropriate as set forth in (b) above, the Company shall endeavor to adhere to the following order:
(a) Verbal warning with written record of warning for the first incident.

(b) Written warning for the second incident.
(c) Disciplinary suspension of three (3) unpaid days for the third incident.
(d) Discharge for the fourth incident.

APPENDIX F

BLACK'S LAW DICTIONARY
WITH PRONUNCIATIONS

SIXTH EDITION

Centennial Edition (1891-1991)

Immoral. Contrary to good morals; inconsistent with the rules ad principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise. Morally evil; impure; obscene; unprincipled; vicious; or dissolute. U.S. v. One Book, Entitled "Contraception," by Marie C. Stopes, D.C.N.Y., 51 F.2d 525, 527. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness; or is wilful, flagrant, or shameless conduct showing moral indifference to opinions of respectable members of the community, and as an inconsiderate attitude toward good order and public welfare. Clarke v. Board of Educ. of School Dist. of Omaha, in State of Neb., 215 Neb. 250, 338 N.W.2d 272, 277. 665. 674

Page 751.

MOTION FILED
AUG 7 1997

No. 97-95

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,
Petitioners,
v.
BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

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IN THE

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Academy of Arbitrators respectfully moves for leave to file the attached *amicus curiae* brief in support of petition for certiorari herein. Counsel for petitioner has given its consent that such a brief be filed. Counsel for respondent has refused, even suggesting that the filing of such a brief would compromise the neutrality of Academy members. The letters granting and denying consent have been lodged with the clerk.

The National Academy, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by a two-thirds vote of the members at its annual meetings after careful consideration of their qualifications by its membership committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception, have obtained general recognition through scholarly publication or other activities as an impartial authority in labor-management relationships. Members are prohibited from serving as advocates for either labor or management. Currently the Academy has 651 American and Canadian members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of the arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> "The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of responsibility for advancing socially desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and

its dedicated and committed leadership throughout its history.[1]

The Academy is the co-author and principal enforcer of an ethical code, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, that has been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. The proceedings of the annual meeting of the Academy are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials on the arbitration process.

The Academy does not ordinarily participate in litigation. It has filed *amicus curiae* briefs in only two cases, both in this Court: *A.T. & T. Technologies* v. *Communications Workers,* 475 U.S. 643 (1986) and *United Paper Workers* v. *Misco,* 484 U.S. 29 (1989). In both cases the brief was filed, with the consent of the parties, because the Academy believed that if the law is to be involved in the arbitration process, as Congress in effect mandated by enacting Section 301 of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185), that involvement should serve to effectuate the purposes for which unions and employers have established that process. This Court's prior decisions with respect to arbitration had served those purposes well but the decisions below in those two cases had the potential for disturbing the regime established by the parties and supported by the prior decisions of this Court.

In *A.T. & T. Technologies* the error of the court below was vesting in the arbitrator rather than a court the right to determine arbitrability of a grievance. In *Misco,* to the contrary, the error was in setting aside an arbitrator's award on the merits. This case is like *Misco*: The Court

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[1] Abernethy, *The Presidential Address,* in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 13.

of Appeals set aside an arbitrator's award on grounds plainly contrary to the principles first announced by this Court in *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). But the importance of this case is not that the court below erred, even if egregiously. The importance of the case, and the reason for this motion, is that this case is but the latest in a series in which the law established by this Court with respect to the review of arbitrators decisions, while duly acknowledged, has in effect been undermined and, in reality, disregarded by the importation of a new doctrine: that it is beyond the arbitrator's authorship to issue an award contrary to what the reviewing court believes the language of the collective bargaining agreement means.

That doctrine was explicitly described by the Court of Appeals for the Fifth Circuit in an earlier decision as "the rule in this circuit and the emerging trend among other courts of appeal." [2] That rule amounts to a standing invitation to both employers and unions to seek judicial review of arbitration decisions with which they disagree. And it has led, as we will demonstrate in the accompanying brief, to a rapidly increasing proportion of decisions in which such review is sought.

Such a trend is not only contrary to the decisions of this Court. It is a pernicious undermining of the system of industrial jurisprudence that has served the nation well in reducing industrial strife. We recognize that this Court is not a court of errors and appeals and does not normally accept cases simply because they are wrongly decided. But when a case such as this one is a symptom of an underlying disease which, if not attended to, will sap the vitality of a sound system of industrial relations it is appropriate that an organization dedicated to the preservation of that system be given an opportunity to express its views in support of review.

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[2] *Delta Queen Steamboat Co. v. District 2, MEBA*, 889 F.2d 599, 604 (5th Cir. 1989) *rehg en banc. denied*, 897 F.2d 746 (1990) *cert. denied*, 498 U.S. 853 (1990).

For these reasons, the National Academy of Arbitrators respectfully requests leave to file the accompanying brief *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-95

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,
Petitioners,

v.

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF THE NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF THE PETITION

INTEREST AND CONCERN OF THE *AMICUS*

The interest and concern of the National Academy of Arbitrators is set out in full in the motion for leave to file to which this brief is appended and will not be repeated here.[1]

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[1] Rule 37.6 statement: Counsel of record is the author of this brief, as well as the accompanying motion for leave to file it. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The decision below is not only contrary to the decisions of this Court, it is the latest of a series of decisions by the Fifth and other circuits adopting a "plain meaning" rule: Arbitration decisions will be set aside if they construe a collective bargaining agreement in a way that contradicts what the court believes is the plain meaning of the agreement. This rule has led to an increasing resort to the courts by both employers and unions that undermines the federal labor policy. Certiorari should be granted to make it clear that the "plain meaning rule" is contrary to this Courts' decisions and that the same standard for revocation of an award applies both to commercial arbitration under the Federal Arbitration Act and labor arbitration under Section 301 of the Labor Management Relations Act.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO CORRECT THE "PLAIN MEANING" RULE FOLLOWED BY THE FIFTH AND SOME OTHER CIRCUITS.

As the petition for certiorari and the dissent in the court below demonstrate, the decision sought to be reviewed is plainly contrary to this Court's decisions in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) and *International Paperworkers Union v. Misco Inc.*, 484 U.S. 29 (1989). The arbitrator and the district court both concluded that it was "unreasonable" to read the contract provision listing "immoral conduct" as a ground for immediate discharge as covering the grievant's conduct. The court of appeal rejected the award because it simply read the provision differently.

The decision is not an isolated aberration. To the contrary, it is just one of a series of cases in which the Fifth Circuit and some other circuits have adopted a mistaken doctrine that this Court should review and reject. In this case the court explicitly said that it acted in

reliance on the rule announced by it in *Delta Queen Steamboat Co. v. District 2, MEBA*, 889 F.2d 599, 604 (5th Cir. 1989): ". . . the rule in this circuit and the emerging trend among other courts of appeals is that arbitral action contrary to express contractual provisions will not be respected." That rule has been consistently applied by the Fifth Circuit. See *Houston Lighting and Power Co. v. International Brotherhood of Electrical Workers*, 71 F.3d 179, 184 (5th Cir. 1995) where the court said: "If the language of the agreement is clear and unequivocal, an arbitrator is not free to change its meaning."

The Fifth Circuit is unfortunately accurate in saying that the rule it announced in *Delta Queen* and applied in this case was an "emerging trend" in other courts of appeal. And because it is accurate we believe it necessary for this Court to intervene by granting review.

The accuracy of the court's statement as to "the emerging trend" is shown by the following quotation from the decision of the Court of Appeals for the Seventh Circuit in *Polk Brothers, Inc. v. Chicago Truck Drivers*, 973 F.2d 593, 599 (7th Cir. 1992):

> "Our holding is consistent with the decisions of several other circuits, which have struck down arbitrator's decisions which were contrary to contractual provisions. See *Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940, 945-46 (1st Cir. 1988); *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63, 65 (2d Cir. 1990); *Delta Queen Steamboat Co. v. District 2, Marine Engineers Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990) ("We agree with the company that the rule in this circuit, and the emerging trend among other courts of appeals, is that arbitral action contrary to express contractual provisions will not be respected."); *International Brotherhood of Electrical*

Workers, Local 429 v. Toshiba America, Inc., 879 F.2d 208, 210-11 (6th Cir. 1989); *Bruno's Inc. v. United Food and Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529, 1531 (11th Cir. 1988)."

As a decision of the First Circuit put it: "if the language of an agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement." *Georgia-Pacific Corp. v. Local 27 United Paperworkers International Union*, 864 F.2d 940, 944 (1st Cir. 1988). Or, as expressed by the Sixth Circuit: "an award fails to derive its essence from the collective bargaining agreement when it conflicts with the express terms of the agreement." *Ficks Reed Co. v. Local 112*, 965 F.2d 123, 125 (6th Cir. 1992).

As the respondent will undoubtedly argue, the Court did say in *Misco*, at 38, that "the arbitrator may not ignore the plain language of the contract." But there is an enormous difference between ignoring the plain language of the agreement and, on the other hand, paying attention to it and construing it in a way that differs from what a court believes that plain language means.

The rule announced by the Fifth Circuit and followed, sometimes erratically, by some other courts of appeal has been applied most often in discharge cases. They exhibit a common pattern. It has long been part of "the common law of the shop" that the degree of penalty that will be sustained by an arbitrator is in keeping with the seriousness of the offense. In cases of extremely serious offenses, arbitrators will sustain discharges where there was no prior warning and no opportunity for the employee to correct his conduct. In less serious cases, arbitrators generally insist upon progressive discipline and reduce the penalty of discharge to a suspension.[2] Recognizing this principle, many collective bargaining agreements spell out, either in the agreement itself or in the rules properly

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[2] Elkouri & Elkouri, *How Arbitration Works* (5th ed., 1997) 916.

issued under it, which offenses are serious enough to justify immediate discharge and which offenses require prior warning or other progressive discipline. Many such agreements, including the agreement in this case, also retain the provision requiring "just cause" for discipline. This creates an interpretive problem: do the parties intend that the categorization of offenses, distinguishing between those for which immediate discharge may be appropriate and those for which progressive discipline is required, eliminates the simultaneous requirement that the discipline imposed be only for "just cause"? In addressing this question arbitrators often conclude that the listing of offenses does not eliminate the requirement of just cause and that if there are mitigating factors or a failure of due process, or if the rule in question is discriminatorily applied, a discharge will be set aside as not for just cause even though it falls within the category of offenses for which prior warning and progressive discipline is not required. As the petition for certiorari demonstrates, the courts of appeal are divided on the question of whether in such instances the arbitrator has departed from the "plain meaning" of the collective bargaining agreement.[3]

In this case neither the arbitrator nor the district court found it necessary to reach the question of whether the listing of "immoral conduct" as an offense justifying dis-

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[3] Compare *S.D. Warren Co. v. Paperworkers Local 1069*, 846 F.2d 827 (1st Cir. 1988) and *Brunos, Inc. v. United Food & Commercial Workers*, 858 F.2d 1529 (11th Cir. 1988) *cert. denied* 488 U.S. 992 (1988) with *Midwest Coca-Cola Bottling Co. v. Allied Sales Division*, 89 F.3d 514 (8th Cir. 1996) and *Arco-Polymers, Inc. v. OCAW, Local 8-74*, 671 F.2d 752 (3d Cir. 1982) *cert. denied* 459 U.S. 828 (1982). For a recent decision reviewing the difference see *Mitchell Plastics, Inc. v. Plastic Workers*, 155 L.R.R.M. (BNA) 2496 (W.D. Pa. 1996).

To avoid this problem some agreements, *but not the agreement in this case*, specify that for some offenses, typically, violation of the no strike clause, the arbitrator shall have no authority to modify the discipline imposed.

charge without prior warning overrode the requirement that there be just cause. Both agreed that it was unreasonable to equate the grievant's little lie with the listed offense of "immoral conduct". But when the Fifth Circuit ordered that her discharge be "reinstated" it effectively, if silently, concluded also that the "plain meaning" of the agreement eliminated the requirement for just cause, a result flatly in conflict with cases in other circuits, most recently the Eighth Circuit in *Local 238, International Brotherhood of Teamsters v. Cargill, Inc.*, 66 F.3d 988 (1955) and the Second Circuit in *First National Supermarkets v. Retail, Wholesale and Chain Store Food Employees Union Local 338*, 155 L.R.R.M. (BNA) 2543 (June 10, 1997).

The "plain meaning" rule has not been limited to discharge cases. An exemplar is the *Polk Brothers* case, *supra*. In that case case an arbitrator found that the employer had violated the contract by contracting out some work and ordered reinstatement with back pay of the employees displaced by the contracting out. The employer did not contest the finding that it had violated the contract, nor the award of back pay up to the date of the contract's termination. It argued, however, that the arbitrator had no authority to award reinstatement and back pay for any period past the contract's termination date. The court sustained this contention, relying on the "plain meaning" rule. The agreement provided that the arbitrator had "no power to add to, subtract from, modify or amend any provision of this agreement", a standard, boilerplate provision stating a principle applicable to all grievance arbitration whether or not spelled out. By providing a remedy subsequent to the termination of the agreement, the court said, the arbitrator contradicted the plain meaning of that provision, a result exactly contrary to the conclusion of this Court in precisely the same situation in *Steelworkers v. Enterprise Wheel & Car, Corp.*, 363 U.S. 593 (1960).

II. THE COURT SHOULD GRANT CERTIORARI TO HARMONIZE THE REVIEW STANDARDS FOR LABOR AND COMMERCIAL ARBITRATION.

Labor arbitration is governed by Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Until 1960 what this Court has since characterized as "the outmoded presumption of disfavoring arbitration procedings" [4] was applied to attempts to enforce arbitration provisions in collective bargaining agreements. The judicial attitude was best expressed in New York in the *Cutler-Hammer* case: [5] "If the meaning of the provision of the contract sought to be arbitrated is beyond dispute there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." The attitude in the federal courts was the same. Agreements to arbitrate would not be enforced unless the party seeking arbitration could "produce evidence which tends to establish his claim" before a court would compel it. *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133, 137 (2nd Cir. 1957) *cert. denied*, 356 U.S. 932 (1958).

This Court in 1960, in what has been called the Steelworkers trilogy, relied on the federal labor law policy expressed in Section 203(d) of the Labor Management Relations Act, 1947, 29 U.S.C. § 173(d) to elevate labor arbitration's status. It said that "the run of arbitration cases illustrated by *Wilko v. Swan*" was irrelevant. "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." *Steelworkers v.*

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[4] *Rodriguez de Quijas v. Shearson/American Express Co.*, 490 U.S. 477, 481 (1989).

[5] *International Ass'n of Machinists v. Cutler-Hammer, Inc.*, 67 N.Y.S. 2d 317, 318 (N.Y. App. Div. 1947) *aff'd* 297 N.Y. 519 (1947).

Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960). Accordingly, "an order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage." *Id.* at 583-584. The *Cutler-Hammer* doctrine was explicitly overruled in *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

Since then the hostility of the courts, and particularly this Court, to commercial arbitration has been completely reversed. The presumption of arbitrability, first stated in labor cases, has now been applied under the Federal Arbitration Act, 9 U.S.C. §§ 1-16. *Moses H. Cone Memorial Hosp. Mercury Construction Corp.*, 460 U.S. 1 (1983). The courts, including this Court, have begun to cite labor arbitration cases indistinguishably from commercial arbitration cases in determining whether arbitration should be ordered.[6]

When review of an arbitration award is sought, however, the emergence of the "plain meaning" rule now inverts this convergence of the standards applicable to labor and commercial arbitration. At common law an arbitration award was not reviewable for error of fact or law. *Burchell v. Marsh*, 58 U.S. (17 HO.) 344 (1855). This rule was embodied in the Federal Arbitration Act. Section 10 of that Act limits the ground upon which an arbitrator's award may be set aside. Although some courts have expanded upon those grounds, relying upon a dictum of this court in *Wilko v. Swan* that an arbitrator's award could be set aside for "manifest disregard" of the law,[7] the plain meaning rule has not been adopted. The courts of appeal have almost uniformly declared that in order

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[6] See, e.g., *First Options of Chicago, Inc. v. Kaplan and M K Investments*, 115 S.Ct. 1920, at 1923-1925 (1995).

[7] *Wilko v. Swan*, 346 U.S. 427, 436 (1953), cited in *First Options of Chicago, supra* n.5 at 1923.

to show manifest disregard of the law it must be shown that the arbitrator both knew the law and consciously determined not to follow it.[8] That the arbitrator misread the plain meaning of the contract being applied is not sufficient to overturn an award under the FAA.[9]

This Court invoked labor policy to reach the same result under Section 301 in the third case of the Steelworkers trilogy, *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). But now what has been aptly called the inverse *Cutler-Hammer* doctrine[10] has been applied by the courts that follow the "plain meaning" rule.

The two different standards for review of arbitration decisions[11] have been described by the First Circuit in *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990):

> ". . . the determinant of this array of alternatively awarded formulations consists of two classes of cases

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[8] *Siegel v. Titan Ind. Corp.*, 779 F.2d 891, 892-893 (2d Cir. 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-934 (2d Cir. 1986).

[9] *I/S Stavborg v. National Metal Converters*, 500 F.2d 424 (2d Cir. 1974); *National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 142 (7th Cir. 1977).

[10] S. Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?*, Proc. of the 40th Annual Mtg. of the Nat'l Acad. of Arbitrators 25, 32 (1988).

[11] As the leading treatise on FAA arbitration puts it: ". . . a number of considerations pertinent to vacation in collective bargaining arbitraiton are not pertinent to FAA arbitration. These include different rules respecting the public policy defense, a greater inclination of some courts treating collective bargaining awards to find a 'failure to draw its essence from the contract' or that an award is against the plain meaning of the collective bargaining agreement." 4 MacNeil, Speidel and Stipanowich, *Federal Arbitration Law* (1995) § 40.5.1.3. See also *id.* at §§ 40.5.2.6. and 40.6.1, where the authors say that the two standards from LMRA cases: "contrary to the plain language of the agreement "and failure to draw its essence from the contract" are inapplicable to FAA arbitration. -

> where an arbitral award is subject to review. One category, usually involving labor arbitration, is where an award is contrary to the plain language of the collective bargaining agreement [citing labor arbitration cases] . . . . The second category embraces instances where it is clear from the record that the arbitrator recognized the applicable law—and then ignored it [citing commercial arbitration cases]."

The courts that do not subscribe to the "plain meaning" rule reject the notion that there are two categories. As Judge Posner put it for the Seventh Circuit:

> ". . . the question for decision by a federal court asked to set aside an arbitration award—*whether the award is made under the Railway Labor Act, the Taft-Hartley Act, or the United States Arbitration Act*—is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987) (emphasis added).

Labor arbitration *is* different from most commercial arbitration. Most commercial arbitration simply decides who owes, or does not owe, how much to whom. Labor arbitration does more. Labor arbitration awards are part of an ongoing and continuing relationship and are an essential part of a system of industrial self-government. As this court has said "it is through these [grievance and arbitration] processes that the supplementary rules of the plant are established." [12] They not only resolve the particular case but also serve as a guide to the parties in their continuing relationship. They are final for the purposes of disposing of a particular grievance. They are also final for determining what the rule under the collective bargaining agreement shall be for the duration of its term.

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[12] *International Paperworkers Union v. Misco, Inc.*, 484 U.S. 29, 38 (1989).

The difference between labor and commercial arbitration should in principle lead to a more generous standard of review in labor arbitration cases. A commercial arbitration award, if set aside, simply changes the result in that particular litigation. A judicial revocation of a labor award changes the rule governing the continuing relationship of the parties. Thus in this case the decision below does more than reinstate Sheila Dixon's discharge. It declares that for the term of this agreement any employee who lies is subject to discharge. It also establishes a much broader proposition: that the contractual requirement for just cause does not apply if any employee commits any of the offenses which the agreement lists as not requiring warning or other progressive discipline, no matter what the circumstances. The decision of the arbitrator, whom the parties have chosen to determine what the applicable rule under this agreement shall be, has been supplanted by a decision of a court.

We believe that it is imperative that this court eliminate the disparity between the rules applicable to the enforcement of labor and commercial awards. We urge the Court to grant certiorari and in its decision make it clear that there is a unitary rule of decision applicable to both. The same standard applied by the courts in reviewing commercial arbitration decisions under the Federal Arbitration Act should be applied in the review of labor arbitration awards under Section 301. Specifically, a claim that an arbitrator's decision is contrary to the plain meaning of the agreement should be rejected unless it is shown, as it must be shown in the review of commercial arbitration awards, that the arbitrator consciously determined not to accept the language of the agreement as binding upon him.[13]

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[13] We do not urge, be it noted, that the same standard must be applied where an arbitrator is construing or applying public law providing protection for employees pursuant to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). On that issue see

III. THE "EMERGING TREND" IDENTIFIED BY THE FIFTH CIRCUIT UNDERMINES THE NATIONAL LABOR POLICY.

It should not be assumed that it is only employers who seek to upset labor arbitration awards. True, in earlier days it was unheard of for a union unhappy with the result of an arbitration decision to seek to vacate it. But the invitation to seek review which the plain meaning rule offers has now been accepted by unions as well as employers.[14]

It could accurately be said in 1973 that "there has not been . . . a single instance in which a basic steel or major automobile manufacturing company, or the union representing its employees, has sought judicial decision as to the arbitrability of a grievance or review of an award."[15] That is no longer true. *Bethlehem Steel Corp. v. Steelworkers,* 138 LRRM 2091 (D. Md. 1991); *United Steelworkers v. Allegheny Ludlum Corp.,* 133 LRRM 2903 (W.D. Pa. 1990). (The statement seems to remain true in automobile manufacturing. In that industry, unlike steel, the no strike provisions have exceptions and, as the daily newspapers testify, strikes are common).

What is true in the steel industry is true generally. The problem presented by the growing willingness to seek review of arbitration decisions is not only that individual awards will be set aside. Except in recent years in the Fifth Circuit a majority of contested awards are in fact

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Cole v. Burns International Services, 105 F.3d 1465, 1486 (D.C. Cir. 1997).

[14] See, e.g., *General Drivers Local 89 v. Payton's, Inc.,* 137 L.R.R.M. 2829 (W.D. Ky. 1959) *revd.* 927 F.2d 604 (6th Cir. 1991); *Oil, Chemical & Atomic Workers v. Amoco Oil Co.,* 811 F. Supp. 260 (S.D. Texas 1993) *revd.* 12 F.3d 208 (5th Cir. 1993); *United Steelworkers v. The Timken Co.,* 717 F.2d 1008 (6th Cir. 1983).

[15] Feller, *A General Theory of The Collective Bargaining Agreement,* 61 Cal. L. Rev. 663, 772 (1973).

confirmed. The problem is that the increase in litigation undermines the Federal labor policy that disputes as to the meaning of a collective bargaining agreement should be resolved by arbitration rather than industrial strife. If arbitration becomes only a way station on the road to judicial interpretation of collective bargaining agreements that policy will essentially be frustrated. The right to strike will become the terminal point in the grievance procedure, as in *Grove v. Ring Screw Works*, 498 U.S. 168 (1990).

That we are well on the way to that destination can be demonstrated. It is impossible to prove with precision that the proportion of arbitration decisions being attacked in court is increasing. But we as practitioners recognize it to be true. And there are two published studies which taken together make it clear that this is the trend. The first study [16] shows, on the one hand, that the total number of labor arbitration awards is decreasing, largely as a function of the decline in unionization. There are no statistics as to the total number of labor arbitration awards but the number of awards issued by arbitrators appointed though the Federal Mediation and Conciliation Service and the American Arbitration Association serve as a reliable proxy. They show that there has been a decline in the number of arbitration awards of 32.5% from the late 1970s to 1990 and that the number has remained relatively constant since then.[17]

While the number of awards was declining, the second study [18] shows that, on the other hand, the number of cases in which there was judicial review has been increas-

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[16] Nolan and Abrams, *Trends in Private Sector Grievance Arbitration*, in Labor Arbitration Under Fire (Stern and Nijita, eds. 1997).

[17] *Id.* at 49.

[18] LeRoy and Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78 (1991).

ing. In the 22 year period from 1960 (the date of *Enterprise Wheel and Car*) through 1981 there were 187 such cases in all of the circuits, for an average of 8.5 per year. But in the later ten year period from 1982 through 1991 there were more than 240 cases, for an average of more than 24 per year.[19] The same phenomenon appears in the number of reported district court decisions, an increase from an average of 24 per year in the 1960-1981 period to 50 per year in the 1982-1991 period. Equally significant, the percentage of cases in which a contested award was enforced in the courts of appeal dropped from 74.9% in the 1960-1981 period to 67% in the 1982-1991 period.

There has been no published study comparing the decisions of the Fifth Circuit alone in these two periods. We have, however, examined all of the relevant decisions of the Fifth Circuit in the ten year period from June, 1987 to date. What we found is that in the Fifth Circuit alone there have been 18 opinions involving the enforcement of arbitration awards and that in only 7, or less than 40%, was the award enforced.

Something should be done to arrest this trend if the Federal labor policy to substitute arbitration for industrial strife as a method of resolving disputes during the term of a collective bargaining agreement is not to be undermined. It is understandable that courts, accustomed as they are to being the final arbiter as to the meaning of contracts, should fail to recognize that in this area they must suppress their natural inclination to correct what they believe has been wrongly decided. And so it may be necessary every ten years or so to remind the courts that in this area that is not their function.

Oral argument is not necessary. A *per curiam* opinion echoing in substance *Misco* and the statement of the Seventh Circuit in *Hill v. Norfolk and Westerns Ry. Co., supra,* will suffice. But something, we submit, must be

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[19] *Id.* at 102. The number is more than 240 since the study includes for 1991 only cases involving public policy challenges.

done to preserve the system that has served management, labor and the nation so well.

CONCLUSION

For the reasons set forth, certiorari should be granted, the decision of the Fifth Circuit should be reversed and the judgement of the District Court reinstated.

Respectfully submitted,

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MOTION FILED

No. 97-95

AUG 15 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,

Petitioner,

—v.—

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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MOTION OF AMERICAN ARBITRATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, the American Arbitration Association respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the Petition. The consent of the parties to the filing of this brief has been requested. Petitioner has given consent; respondent has refused.

INTEREST OF THE AMERICAN ARBITRATION ASSOCIATION

The American Arbitration Association ("AAA") is a not-for-profit, public service organization which offers a broad range of dispute resolution services through its 38 offices located in major cities throughout the United States and worldwide. Millions of workers are currently covered by arbitration provisions contained in collective bargaining agreements ("CBAs") administered by AAA. In addition to providing the labor management community with case administration services, AAA conducts educational programs; maintains rosters of neutrals; maintains administrative procedures, rules and guides; publishes labor arbitration awards; provides membership services; and maintains a comprehensive library and research facilities. AAA is dedicated to the speedy resolution of labor and other disputes through arbitration, mediation, fact-finding, and other conflict resolution techniques. For seventy years, AAA has set the standard for the development of fair and equitable dispute resolution procedures.

AAA is regularly engaged in administration of arbitration proceedings pursuant to CBAs of the type at issue in the union's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"). Thus, AAA is uniquely qualified to elaborate on the concern set forth in the Petition that to allow the Fifth Circuit decision to stand is "to destroy arbitration's utility as a final and binding method of resolving contractual disputes." Petition at 8. AAA's analysis of the legal and practical significance and consequence of the Fifth Circuit's decision below provides an important perspective which will assist the Court in its consideration of the Petition;

therefore, AAA respectfully moves for leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

/s/ Michael F. Hoellering

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amicus curiae,* the American Arbitration Association. The consent of the parties to the filing of this brief has been requested. Petitioner has given consent; respondent refused.

INTEREST OF AMICUS CURIAE

The American Arbitration Association ("AAA") is a not-for-profit, public service organization which offers a broad range of dispute resolution services through its 38 offices located in major cities throughout the United States and worldwide. Millions of workers are currently covered by arbitration provisions contained in collective bargaining agreements ("CBAs") administered by AAA. In addition to providing the labor management community with case administration services, AAA conducts educational programs; maintains rosters of neutrals; maintains administrative procedures, rules and guides; publishes labor arbitration awards; provides membership services; and maintains a comprehensive library and research facilities. AAA was also instrumental in promulgating a Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, and cooperates with the National Academy of Arbitrators in seeking to control and limit wasteful and unproductive arbitration-related litigation. For seventy years, AAA has been dedicated to the resolution of disputes through arbitration, mediation and other alternative dispute resolution techniques.

Because AAA is regularly engaged in administering labor-management arbitration agreements -- a process that is being seriously undermined as a result of the decision below -- AAA has a substantial interest in the Court's resolution of the important questions of arbitration policy presented by the Petition.

SUMMARY OF ARGUMENT

This case is significant in that it presents squarely the question of when an arbitrator's award draws its "essence" from

a collective bargaining agreement. More than 30 years ago, this Court determined that arbitrators' awards are entitled to a deferential standard of review. An arbitrator's ruling must be confirmed if it in fact draws its "essence" from the collective bargaining agreement. Despite this standard and this Court's well-established support of arbitration, certain lower courts -- including the Fifth Circuit in the proceeding below -- have overstepped the bounds of the Court's mandate of limited review and have improperly reevaluated the *merits* of underlying disputes. This case affords a desirable and necessary occasion for the Supreme Court to reconfirm and clarify the "essence" test before the arbitral system in the United States becomes a casualty of second-guessing courts.

Here, the Fifth Circuit has interposed its own view of morality on the collective bargaining agreement in evaluating and ultimately reversing the arbitrator's decision. This interference with the arbitration process runs contrary to this Court's rulings -- as well as similar holdings of the Fifth Circuit itself.

Unless the Petition is granted, the Fifth Circuit's vastly expanded standard of review of arbitrators' decisions will impact negatively the practice and procedure of labor arbitration and will, if not corrected, affect adversely the ability of employers, employees, and unions to efficiently and effectively resolve workplace disputes. Simply put, the Fifth Circuit's decision will encourage and may result in a flood of court litigation to review arbitrators' awards.

Accordingly, the Court should take this opportunity not only to reverse the decision of the Fifth Circuit in this case, but also to reaffirm and further clarify the standards to which all lower courts must adhere in reviewing labor arbitration awards.

ARGUMENT

I. THE GROWTH OF IMPORTANCE OF ARBITRATION IN THE AMERICAN LEGAL SYSTEM

The American system of "justice for all" offers a commitment to just, speedy, and inexpensive resolution of civil disputes in the courts. However, as noted by Senator Orrin G. Hatch in his report to the Senate on the Civil Justice Reform Act of 1990, "[h]igh costs, long delays and insufficient resources all too often leave this time-honored promise unfulfilled." S. Rep. No. 416, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6804, 6804.

As a result, an extraordinary interest has developed over the past several decades in resolving disputes outside of the court system. The process of arbitration, in particular, has gained widespread acceptance as a useful and efficient tool for dispute resolution -- both pursuant to collective bargaining agreements and otherwise. In a recent study of 1,000 of the largest U.S. corporations, 79 percent reported using arbitration within the past three years. David B. Lipsky & Ronald L. Seeber, The Use of ADR in U.S. Corporations: Executive Summary, (A Joint Initiative of Cornell University, The Foundation for the Prevention and Early Resolution of Conflict, and Price Waterhouse LLP) (1997). In the labor-management context, virtually all collective bargaining agreements provide for arbitration of unresolved grievances. Last year, more than 15,600 labor disputes were filed for arbitration with AAA alone.

This Court has encouraged the use of private dispute resolution and, in another context, has supported the reversal of

the "anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 n. 14 (1985) (citations omitted); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-221 and n.6 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 and n.4 (1974). It is plain that arbitration offers significant advantages in the resolution of disputes.

Arbitration offers an agreed-upon process of dispute resolution. Arbitration in the labor-management context is generally the result of a negotiated, contractual exchange. The parties have agreed to include the process in the CBA, and, often, have chosen an arbitration administrator, such as AAA, or even a particular arbitrator or panel of arbitrators, in advance of a dispute.

Arbitration under a CBA serves several advantageous purposes. First, it creates a private system of industrial justice, tailored to fit the needs of the particular parties to the CBA. In United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 581 (1960), this Court recognized that "[a]rbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." In addition, the very process of arbitrating disputes often acts to explicate the terms of the CBA. See id.

Finally, inclusion of an arbitration policy in a CBA is a mechanism for industrial peace -- often the arbitration agreement is the negotiated *quid pro quo* for an agreement not to strike. The opportunity to present grievances to a neutral party who will

render a binding decision serves to prevent workers from engaging in self-help in response to a disagreement with management. As the Fifth Circuit has recognized, "respect for the finality of arbitration awards furthers the public policy of encouraging management and labor to settle their disputes through arbitration rather than through strikes and violence." Manville Forest Prods. Corp. v. United Paperworkers Int'l Union, 831 F.2d 72, 74 (5th Cir. 1987) (citing Warrior & Gulf Navigation Co., 363 U.S. at 578).

Arbitration offers an expert decisionmaker. This Court itself has acknowledged that an arbitrator, rather than a judge, is the preferred decisionmaker to resolve disputes under CBAs:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed by[sic] foreign to the competence of courts.
> * * * The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further the common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs.

Warrior and Gulf Navigation Co., 363 U.S. at 581-82. As acknowledged by the Court, the decisionmaker in arbitration is an industrial expert. He is usually well-versed in employment

disputes and in interpreting CBAs. Parties select an arbitrator based at least in part on their "confidence in his knowledge of the common law of the shop." Id. at 582. An arbitrator also is often chosen because he is familiar with the particular plant or the particular CBA at issue. Cf. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). ("[Arbitrators] sit to settle disputes at the plant level -- disputes that require for their solution knowledge of the custom and practice of a particular factory or of a particular industry as reflected in particular agreements."); Mitsubishi Motors Corp., 473 U.S. at 633 ("[A]daptability and access to expertise are hallmarks of arbitration.").

Arbitration offers an expeditious, final resolution. Like litigation, arbitration offers an impartial, final and binding decision rendered by a third party; among the significant advantages of arbitration is that it allows parties to avoid the time and expense of formal court proceedings. As recognized by this Court, "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." Mitsubishi Motors Corp, 473 U.S. at 633.

More than 30 years ago, in recognition of the benefits of labor arbitration, this Court declared that agreements to arbitrate are entitled to great deference. In the seminal cases of United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960), and Warrior and Gulf Navigation Co., 363 U.S. 574, this Court recognized and supported the trend of submitting labor cases to arbitration by establishing that the role of a court is strictly limited once parties have agreed to arbitrate. When asked to evaluate whether a particular dispute must be arbitrated, a court

is confined to determining whether the dispute at issue is governed by the agreement to arbitrate: "Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator." Am. Mfg. Co., 363 U.S. at 567-78.

Once an award has been rendered, courts are similarly limited in the scope of their review of the arbitrator's decision. The question of the proper interpretation of the contract as applied to a particular dispute is again "a question for the arbitrator." Enterprise Wheel & Car Corp., 363 U.S. at 598. Unless the arbitrator's decision fails to "dra[w] its essence from the collective bargaining agreement," a court must enforce the award and may not review the merits of the dispute. Id. at 597. In 1976, the Fifth Circuit itself acknowledged this limited role in reviewing arbitration decisions, stating that "when the question of arbitrability is resolved in favor of arbitration, our only remaining function is to determine whether the award draws its 'essence' from the collective bargaining agreement; we do not review the merits or the factual and legal accuracy of the arbiter's findings." Int'l Ass'n of Machinists and Aerospace Workers, District 776 v. Texas Steel Co., 538 F.2d 1116, 1120-21 (5th Cir. 1976) (citation omitted). Further, the court held that "[t]he 'essence' standard is to be interpreted expansively so as to uphold the award, rather than restrictively." Id. at 1121.

Under the essence standard, even if a party alleges that an award is based on errors of fact or misinterpretation of the contract, a court is not permitted to consider the merits. See United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 36 (1987). Even if the court itself believes that the arbitrator has made the wrong decision, it may not apply its "own brand of industrial justice." Id. at 38 ("[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed

serious error does not suffice to overturn the decision."); accord Dixie Machine Welding & Metal Works, Inc. v. Int'l Brotherhood of Boilermakers, 867 F.2d 250 (5th Cir. 1989). Accordingly, a court may not overturn an arbitrator's decision "simply because the court believes its own interpretation of the contract would be a better one." W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of Am., 461 U.S. 757, 764 (1983) (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596). In Enterprise Wheel & Car Corp., the Court reversed the Fourth Circuit where "[t]he Court of Appeals' opinion . . . was not based upon any finding that the arbitrator did not premise his award on his construction of the contract. It merely disagreed with the arbitrator's construction of it." 363 U.S. at 598.

II. THE FIFTH CIRCUIT'S DECISION CREATES A NEW STANDARD OF JUDICIAL REVIEW OF ARBITRAL DECISIONS AND CONFLICTS WITH ESTABLISHED PRECEDENT

Despite the intent of the Steelworkers' Trilogy, some Circuit Courts have grossly misapplied the essence test. Given the Court's well-established standards of arbitral review, it should be obvious that courts are not permitted to evaluate the merits of an arbitrator's award. However, that is exactly what the Fifth Circuit did in Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713, 103 F.3d 449 (1997), the decision below. The Fifth Circuit rejected the arbitrator's award based on its own construction of the contract, substituting its view of a phrase in the collective bargaining agreement, "immoral conduct," for that of the arbitrator. The majority concluded that the employee's action -- giving a false reason for her request for a short leave from work

in order to pay her electric bill and have her electricity turned back on -- was "immoral conduct" requiring dismissal.

In contrast, the arbitrator had interpreted "immoral conduct" under the agreement as *not* encompassing the act at issue. The arbitrator was faced with an employee's lie concerning the reason for requested time off. There was nothing in the contract requiring the arbitrator to find that this particular behavior constituted immoral conduct or required immediate discharge. The arbitrator did what he was selected to do: utilize his judgment to interpret the contract in light of existing circumstances.

This Court's holdings in United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) and United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 36 (1987) make clear what Judge Benavides echoed in his strong and cogent dissent: It was solely up to the arbitrator to determine whether the conduct engaged in by the discharged employee amounted to immoral conduct under the CBA. See Bruce Hardwood Floors, 103 F.3d at 454 (citing Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F. 2d 940 (1st Cir. 1988)). In Georgia-Pacific Corp., where the contract term at issue was "dishonesty," the First Circuit stated:

> Although the collective bargaining agreement in this case authorizes immediate discharge for dishonesty, it does not define that term. It is thus up to an arbitrator to decide whether a given pattern of conduct amounts to dishonesty. For example, an arbitrator may decide that stealing a company pencil does not amount to dishonesty for purposes of immediate discharge.

864 F.2d at 945 n. 2.

Simply put, the arbitrator here found it unreasonable to interpret "immoral conduct" *as expressed in the CBA* as including giving a false reason, when pressed, for requesting a 45-minute absence from work. Despite the Fifth Circuit's determination that lying is "[b]y definition" immoral, Bruce Hardwood Floors, 103 F.3d at 452 n.4, immoral conduct was *not* so defined in the CBA. It defies logic to assume that the company or the union had the Sixth Edition of Black's Law Dictionary in mind when drafting the grounds for discipline. Further, as noted by George Nicolau, President of the National Academy of Arbitrators, "[t]he fact that the 6th Edition didn't mention lying didn't faze the majority at all." Whatever Happened to Arbitral Finality? Is It Their Fault Or Ours?, LABOR LAW JOURNAL, May 1997 at 264.

The Bruce Hardwood Floors decision is not an isolated case;[1] there are, unfortunately, similar such circuit court cases,

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[1] Similarly, it is not unusual for an arbitrator to be required to determine whether an employee has engaged in "immoral conduct"; thus, there is no reason for a court to take such an issue out of the hands of an arbitrator. See, e.g., Georgia-Pacific Corp. v. Int'l Woodworkers of Am., 104 Lab. Arb. (BNA) 1213 (1995) (Allen, Arb.) (determining that stealing and lying by punching another employee's time card constitutes "immoral conduct"); California Sch. Employees Ass'n v. Stockton Unified Sch. Dist., 1995 WL 594536 (1995) (Concepcion, Arb.) (finding that the grievant had engaged in "immoral or unprofessional conduct" by lying and intentionally deceiving his employer regarding his reasons for requested time off); James River Corp. v. United Paperworkers Int'l Union, 1994 WL 853688 (1994) (House, Arb.) (holding that the grievant was not guilty of "immoral or improper conduct" where he had engaged in a fight with a co-worker).

with the Fifth Circuit's opinion here as a stark illustration, reflecting a more probing (and inappropriate) review than that sanctioned by this Court. While it is consistent with this Court's precedent to overturn arbitral action that violates the parties' contractual mandates, some courts have gone too far -- to the point of evaluating the merits of the dispute and using their own interpretation of the contract language to determine whether the action is contrary to "express" provisions. See e.g., Browning-Ferris Industries of Tennessee, Inc. v. Teamsters Local Union No. 984, No. 90-5933, 1991 U.S. App. LEXIS 24760 (6th Cir. Oct. 10, 1991); Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n, 889 F.2d 599, 604 (5th Cir. 1989), rehearing denied, 897 F.2d 746, cert. denied. 498 U.S. 853 (1990); S.D. Warren Co. v. United Paperworkers' Int'l Union, 846 F.2d 827 (1st Cir. 1988).

Like the Fifth Circuit below, the Sixth Circuit in Browning-Ferris Indus., 1991 U.S. App. LEXIS 24760, substituted its own interpretation of a contract term for the arbitrator's in order to overturn an award. The terms of the CBA allowed discharge in case of "theft." Id. at *3. Based at least in part on "the intent of the parties to the collective agreement," the arbitrator determined that the employee's behavior was not "theft" as defined under the CBA. Id. at *7. The Sixth Circuit determined that "the arbitrator's decision ignores the *plain meaning* of the word 'theft' in the contract, and hence can not be enforced." Id. at *23 (emphasis added). The court ruled that the "plain meaning" of the word theft, as defined in Webster's Third New International Dictionary, should prevail over the arbitrator's interpretation. While acknowledging that the controlling standard required enforcement of "any plausible construction of [the CBA] term by the arbitrator, even one wholly at odds with what would be considered the 'plain meaning' of the term," id. at *10, the Sixth Circuit ignored this

bedrock legal principle by replacing the arbitrator's interpretation of the contract with Webster's Dictionary and the court's own construction of the CBA term.

In Delta Queen Steamboat Co., 889 F.2d 599, the arbitrator had found that while the employee had engaged in dismissable misconduct as defined under the contract, he was the victim of disparate treatment and, thus, should not be discharged. Despite its awareness of the limited standard of review, 889 F.2d at 602, the Fifth Circuit reviewed the contract and interpreted a clause in the CBA allocating to management the power to discipline and discharge to find that there was just cause. This finding was impermissible under the "essence" test; the determination of whether there was just cause for discharge was solely for the arbitrator. As stated by the dissent to the denial of the rehearing en banc, this opinion "constitutes a significant and regrettable departure from the well-established law of this Circuit, and of the entire country, on deference to labor arbitration awards." 897 F.2d at 742 ("I can only conclude that an intense disagreement with the arbitrator's reinstatement decision by the panel has led it to decide that the arbitrator departed from the contract in reaching that decision.").

The First Circuit, in S.D. Warren Co., 846 F.2d at 827, similarly departed from this Court's standard of review. The First Circuit violated the mandate of Enterprise Wheel & Car Corp., 363 U.S. at 598, by applying its own understanding of the contract to determine that the arbitrator had abused his authority in finding that the discharge of the employees was not within the discretion of the employer. 846 F.2d 827, 828. Although the arbitrator found that the applicable contract language was ambiguous and interpreted it in favor of the employees, the court disagreed, based on its own understanding of the provisions's clear meaning under the "English language." Id.

As this Court concluded in United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 569 (1960), "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." This Court intended that this function remain with the arbitrator, even if a court believes the decision is "wrong."

As discussed above, although the Court established the appropriate standard of judicial review of labor arbitration awards over 30 years ago, such standard is not being applied consistently or appropriately by the circuit courts. Judges in both the Sixth and Seventh Circuits have commented on the difficulty of applying the essence standard. See Lattimer-Stevens Co. v. United Steelworkers of Am., 913 F.2d 1166, 1170 (6th Cir. 1990) (Boggs, J., dissenting), reh'g en banc denied, 1990 U.S. App. LEXIS 22057 (6th Cir. Dec. 4, 1990); Chicago Typographical Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1506 (7th Cir. 1991). It is unclear whether the disregard of this Court's mandate of limited review of arbitrators' decisions is intentional, or due to some misunderstanding of the "essence" of the contract standard. In either case, it should not be tolerated. To the extent that the settled law is unclear to the courts, it is time for the Court to reinforce the limits of a court's reviewing authority of a labor arbitration decision.

III. THE FIFTH CIRCUIT'S DECISION UNDERMINES ARBITRATION AGREEMENTS AND ERODES THE BENEFITS OF ARBITRATION.

Although courts (including the Fifth Circuit) continue to enforce agreements to arbitrate, decisions like Bruce Hardwood

Floors adversely affect the entire arbitration process. For, if a court is allowed to substitute its own judgment for the judgment of an arbitrator, as the Fifth Circuit did in this case, the recognized benefits of arbitration will be diminished and the process will lose its effectiveness.

The decision undermines the agreed-upon method of dispute resolution. In the case below, the Fifth Circuit substituted its own opinion for exactly what the parties had agreed upon, i.e., the acceptance as final of the arbitrator's judgment. The arbitrator made a decision which was squarely within the four corners of the CBA; that is precisely the justice for which the parties contracted. Reversal of an arbitrator's decision under facts such as these obviates the parties contractual agreement. As stated by this Court in enforcing an arbitration provision in a collective bargaining agreement, "[i]n these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." United Steelworkers of Am. v. Am. Mfg Co., 363 U.S. 564, 568 (1960); see also Saint Mary Home, Inc. v. Service Employees Int'l Union, No. 96-9353, 1997 U.S. App. LEXIS 15015 (2d Cir. May 30, 1997) ("In contracting for arbitration of disputes over whether just cause existed for discharging employees, the parties bargained for a decision by the arbitrator, not necessarily a good one, and that is what they received.") (citation omitted).

The parties have contracted to have disputes settled by the arbitrator, thus "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 37-38 (1987). The Fifth Circuit itself has recognized this: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." Safeway Stores v. Am. Bakery and

Confectionery Workers Int'l Union, Local 111, 390 F.2d 79, 84 (5th Cir. 1968); accord Dixie Machine Welding & Metal Works, Inc. v. Int'l Brotherhood of Boilermakers, 867 F.2d 250, 253 (5th Cir. 1989) ("Federal law gives very great deference to private ordering in arbitration cases. The parties have contracted to be bound, and bound they stay."); Manville Forest Prods. Corp. v. United Paperworkers Int'l Union, 831 F.2d 72, 74 (5th Cir. 1987) ("The parties bargained for an arbitrator who would determine facts and interpret the contract; there is no injustice in holding them to this bargain.") (citation omitted) .

Finally, allowing this decision to stand might discourage parties from including arbitration provisions in collective bargaining agreements -- if a large number of disputes eventually end up in court, there is less incentive to agree to arbitration. Such a development would undermine the basic fabric of labor-management relations and accepted methods of achieving industrial peace. As this Court recognized, "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 n. 4 (1960) (citation omitted). The Fifth Circuit itself recognized that if it were permissible for a court to review an arbitrator's construction of the contract, "arbitration as a structure for industrial peace supplanting the usual processes of court adjudication would itself be supplanted by the judicial machine at the time it would count the most -- that is, at the moment an arbiter's award was sought to be enforced." Safeway Stores, 390 F.2d at 82.

The decision undermines arbitration's benefit of an expert decisionmaker. If this decision is allowed to stand, arbitration increasingly will no longer offer parties the traditional advantage of a decision by an agreed-upon expert. It will be the decision of

an agreed-upon expert, *but only if* the judge agrees. This would not only be contrary to the parties' agreement, but would lead to undesirable results. As recognized by this Court, "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." Warrior & Gulf Navigation Co., 363 U.S. at 582.

The decision undermines arbitration's benefit of a speedy, final resolution. Arbitration will no longer be a faster and cheaper alternative to litigation; it will become simply a precursor to litigation. If courts are permitted to review an arbitration decision *de novo* under the guise of reviewing the essence of the contract, then *all* losing parties will have an incentive to appeal. As noted by one commentator, "court decisions vacating arbitration awards beget more lawsuits seeking to set aside awards -- and so on." George H. Cohen, Erosion of the Arbitration Process by the Courts: Can the Award and Opinion be Immunized?, in ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 154-55 (Gladys W. Gruenberg ed, 1992). As a result, arbitration will no longer offer a final and binding determination: "[P]lenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599.

By reevaluating arbitration awards on the merits, courts are "sending a signal to companies [and employees] who lose labor arbitrations which says 'Come to us! If we think the interpretation of your contract is wrong even though the provision is ambiguous, we will find for you that the arbitrator

exceeded his jurisdiction and set his award aside.'" Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n, 897 F.2d 746, 750 (Williams, J., dissenting to denial of rehearing en banc). Any party unhappy with an arbitrator's decision will go to court to try to find judges, like the panel here, who will impose their own particular brand of industrial justice. Not only will the losing party be afforded "two bites at the apple," but the path to a final and binding resolution will be needlessly prolonged -- parties will be forced to undergo one procedure in the arbitration and then repeat the process in the courtroom.

The refusal of courts to review the merits of an arbitration award is the appropriate and well-established approach. To allow any court to overturn an arbitrator's decision based on a conception of morality gleaned from the pages of Black's Law Dictionary would undermine the established system of review and negatively impact the practice of arbitration. Nor is this an isolated case; in the district and circuit courts, the issue of whether an arbitrator has exceeded his authority is a "recurring question." Houston Lighting & Power Co. v. Int'l Brotherhood of Elec. Workers, Local Union No. 66, 71 F.3d 179, 180 (5th Cir. 1995), cert. denied, 117 S.Ct. 52 (1996). It is this case, however, that provides the court with an ideal opportunity to reaffirm and clarify the proper standard of review of a labor arbitration award.

CONCLUSION

WHEREFORE, AAA respectfully urges the Court to grant the Petition and vacate the decision of the court below.

Respectfully submitted,

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No. 97-0095

In The

Supreme Court of the United States

October Term, 1996

UBC SOUTHERN COUNCIL OF INDUSTRIAL WORKERS, LOCAL UNION NO. 2713,

Petitioner,

vs.

BRUCE HARDWOOD FLOORS, A DIVISION OF TRIANGLE PACIFIC CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Have the lower courts correctly adhered to the standard of judicial review of labor arbitration awards as clearly articulated by this Court?

2. Is there a conflict in the circuits as to the authority of courts to set aside arbitral awards?

STATEMENT OF INTERESTED PARTIES

Pursuant to Supreme Court Rule 29.6, Respondent Bruce Hardwood Floors discloses that it is a wholly-owned subsidiary of Triangle Pacific Corporation, 16803 Dallas Parkway, Dallas, Texas 75248.

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APPENDIX

Appendix A — Article 9, Section 3 of the Collective Bargaining Agreement 1a

REASONS FOR DENYING THE WRIT

The first question as presented by the Petitioner UBC Southern Council of Industrial Workers ("Petitioner" or "Union")[1] exposes its attempt to implore this Court to review a singular decision which it finds disfavorable. The Union argues that the Fifth Circuit reversed a district court decision and vacated an arbitral award because the Court read an express provision differently than the arbitrator. In actuality, the Fifth Circuit found that the arbitrator refused to apply an express contractual provision and in so doing, exceeded his arbitral authority. *Bruce Hardwood Floors v. UBC, Southern Council of Industrial Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir. 1997). As further demonstration of the arbitral excess in the case, the Court of Appeals noted that the arbitrator formulated his own unique discipline for the admitted offender instead of applying the bargained-for discipline for the offense as agreed upon by the parties.[2] Simply because the Union disagrees with the Fifth Circuit's holding, it now attempts to overturn a decision which presents no novel or pivotal issues of law. The Fifth Circuit's reasoning was in line with this Court's holdings in the

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1. "Whether in an action under Section 301 of the Labor Management Relations Act, it is permissible for a court to set aside an arbitrator's decision because it believes the arbitrator misread the collective bargaining agreement."

2. The Agreement between the parties requires immediate discharge for certain listed offenses, including the immoral conduct of lying to which the grievant expressly admitted. Although the arbitrator found that the lying in fact had occurred, he deemed it worthy only of progressive discipline. Nevertheless, he failed to employ the progressive discipline as outlined in the Agreement, but mandated an arbitrary ten (10) day suspension for the grievant. The Fifth Circuit held that the arbitrator's actions contravened the prohibition in the Agreement restricting arbitrators from adding to, amending or departing from the terms of the Agreement. *Bruce Hardwood Floors v. UBC*, (Petitioner's Appendix C[5], hereinafter referred to as "Pet. App.").

Steelworkers Trilogy,[3] as well as this Court's decision in *International Paperworkers Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1989).

As an alternative to its transparent endeavor to use this Court to review a correctly decided case, the Union appeals to this Court to redefine a clearly stated federal policy regarding enforcement and vacating of labor arbitration awards. The Union erroneously argues that there is a conflict among the circuits in applying the standard articulated by this Court for judicial review of arbitration awards. *See Steelworkers Trilogy*; *Misco, Inc.* However, the Union's question as presented in its Petition for Certiorari ("Petition") incorrectly states that there is a "federal policy of enforcing labor arbitration awards." Although this Court has pronounced that arbitration awards are to be given great deference, this is a far cry from a policy to *enforce* arbitration awards or one, in other words, which insulates them from being vacated where appropriate. Accordingly, in reviewing arbitral awards, the federal courts of each circuit have consistently applied the principle enunciated by this Court that an arbitrator may not merely "dispense his own brand of industrial justice" but is confined to interpretation and application of the collective-bargaining agreement. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 587, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). In short, the questions presented in the Union's Petition do not raise issues suitable or ripe for resolution by this Court, and the Petition therefore should be denied.

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3. *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

I.

LOWER COURTS HAVE CORRECTLY ADHERED TO THE STANDARD OF JUDICIAL REVIEW OF LABOR ARBITRATION AWARDS AS CLEARLY ARTICULATED BY THIS COURT.

A cursory examination of the relevant case law reveals that when reviewing labor arbitration awards, each circuit clearly enunciates this Court's well-settled standard of review. A closer scrutiny, however, discloses that the critical distinction among these decisions is the fact-specific implementation of this standard. Each case turns on the manner in which the particular issue in dispute should be decided, with regard to the particular wording of the collective bargaining agreement binding the parties *and* the arbitrator. Thus, the specific wording of the collective bargaining agreement ("CBA" or "contract") between a company and a union governs an arbitrator's decision.

Although the Union's Petition initially appears to present a broad question regarding application of federal labor policy in the circuits, its analysis makes clear that the real issue it seeks to resolve is whether courts are properly reviewing arbitration decisions which distinguish "just cause" and "listed offense" discharges. However, it is virtually impossible to limit this Court's review to such a fact-specific inquiry. Because each contract is negotiated and bargained-for between different companies and unions, each contract is distinct and tailored to fit the needs and preferences of the different parties. The crucial inquiry is therefore not whether an arbitrator correctly found that an offense should have resulted in a "just cause" or a "listed offense" discharge, but rather whether the arbitrator exceeded the scope of the parties' submission in making this determination.

What is certain is that all the circuit courts of appeal have made it clear that an arbitrator has no authority to disregard the clear expression of the parties by ignoring the explicit language of a contract. It is the arbitrator's job to determine what the contract says, and if not clear, what the parties intended. He cannot substitute his own judgment with respect to application of a contract which contains no ambiguity. Thus, all courts have correctly held, as directed by this Court, that an arbitral award should not be enforced if the arbitrator's words manifest an infidelity to his obligation to interpret a collective bargaining agreement. *Enterprise Wheel Car Corp.*, 363 U.S. at 597. Furthermore, where an arbitrator utilizes outside sources or bases his award on thoughts or feelings of equity and fairness not articulated in the contract, his award cannot stand. *See Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63 (2nd Cir. 1990); *Pennsylvania Power Co. v. Local Union #272 of the Int'l Bhd. of Elec. Workers*, 886 F.2d 46, 48 (3rd Cir. 1989); *Houston Lighting & Power Co. v. IBEW*, 71 F.3d 179 (5th Cir. 1995); *Cement Divisions, National Gypsum Co. v. United Steelworkers of America*, 793 F.2d 759 (6th Cir. 1986); *Tootsie Roll Indus. v. Local Union No. 1, Bakery Workers' Int'l Union*, 832 F.2d 81 (7th Cir. 1987); *Riceland Foods, Inc. v. United Bhd. of Carpenters, Local 2381*, 737 F.2d 758 (8th Cir. 1984), *cert. denied*, 471 U.S. 1102, 85 L. Ed. 2d 845, 105 S. Ct. 2327 (1985);

Contrary to the arguments made by the National Academy of Arbitrators and the American Arbitration Association in their Amicus Briefs, to allow an arbitrator to substitute his judgment for that of a Company's management would more so undermine the nature and purpose of alternative dispute resolution than would limiting a party's right to seek judicial review of an award made in excess of arbitral authority. In the instant case, rather than the decision of the arbitrator being supplanted by a decision of the court, the arbitrator supplanted the intent of the parties.

When an arbitrator inserts his own brand of industrial justice into an arbitration award, § 301 of the Labor Management Relations Act provides a "check and balance" to restrict such arbitral excess. This is necessary for the continuance of a dependable mechanism to reconcile differences between companies and unions which have chosen to express the rules and regulations governing them by means of collective bargaining agreements. It is important to note that both companies and unions may invoke § 301 to appeal and seek vacation of arbitration awards which contravene these collective bargaining agreements, and both groups have generously utilized that right where necessary. Some appeals have met with success, others have not. Each case turns on the lower court's application of this Court's standard; however, the important point is that there exists the opportunity for review when a party feels an arbitrator has betrayed his obligation to apply the terms and conditions within the collective bargaining agreement.

In the instant case, Respondent Bruce Hardwood Floors ("Bruce Hardwood" or "Company") exercised its prerogative to remedy an erroneous arbitration award which failed to apply discipline as agreed upon and provided for in its contract with the Union. Because the Fifth Circuit correctly applied this Court's standard in reviewing the lower court decision and vacating the arbitration award, there is no reason for this Court to grant certiorari to review the Fifth Circuit's decision. This Court has clearly articulated the standard of review employed by the Fifth Circuit and the remaining circuits with respect to judicial review of labor arbitration awards and need not further expound on this issue.

II.

THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE AUTHORITY OF COURTS TO SET ASIDE ARBITRAL AWARDS.

In its attempt to establish a non-existent split in the circuits surrounding review of labor arbitration awards, Petitioner correctly acknowledges that the First and Fifth Circuits have directly applied this Court's admonition that an arbitrator's authority is derived solely from the underlying CBA and cannot reflect his own brand of industrial justice. *See Georgia Pacific v. Local 27, United Paperworkers Int'l Union*, 864 F.2d 940 (1st Cir. 1988); *Delta Queen Steamboat Co. v. District 2, Marine Engineers Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989), *reh'g denied*, 897 F.2d 746, *cert. denied*, 498 U.S. 853 (1990). In applying the standard to unique fact patterns and particular contractual language, those circuits have uniformly held that where a CBA limits an arbitrator's discretion, the arbitrator may not modify the penalty imposed by the employer. *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 846 F.2d 827 (1st Cir. 1988), *cert. denied*, 488 U.S. 992 (1988); *Container Products, Inc. v. United Steelworkers of America*, 873 F.2d 818 (5th Cir. 1989).

For instance, in *Georgia-Pacific* and *Delta Queen*, the circuit courts found that where an employee may be terminated for a listed offense *or* for just cause, an arbitrator's finding that the listed offense occurred precludes any further just cause inquiry because to do so would ignore the "plain language" of the contract. Despite the argument made by the National Academy of Arbitrators ("National Academy") in its Amicus Brief, the circuits are not split as to their application of this "plain meaning" standard. As stated above, each contract is different; therefore, each decision will be different in its resolution of the

facts to the specific contract language at issue in the case. Where there is any question as to what was intended, the arbitrator must take language as its plain meaning. If the arbitrator does not follow the plain meaning (in the absence of evidence of another meaning), then it is obvious that the arbitrator is going beyond the limits of the contract to substitute his own judgment. That is clearly what the arbitrator did in this case — and what he admits to doing.

As the National Academy's Brief surmised, the Company notes that this Court stated in *Misco, Inc.*, 484 U.S. at 38, that an arbitrator "may not ignore the plain language of the contract." Clearly, an arbitration decision cannot draw its essence or arguably apply a contract when it ignores the contract language. Despite this clear mandate from the Supreme Court, the National Academy argues that the "common law of the shop"[4] is that the seriousness of the offense will govern the degree of the penalty imposed. The National Academy states that "[i]n less serious cases, arbitrators generally *insist* upon progressive discipline and reduce the penalty of discharge to a suspension." (Nat'l Academy Brf., p. 4) (emphasis added). However, it is not for an arbitrator to "insist" on anything. Rather, it is for the arbitrator to follow the contract and apply its plain meaning. In the instant case, there was nothing in the Agreement's progressive discipline section which applied to lying. Thus, the Fifth Circuit properly found that there was no support in the record for the arbitrator's modification of the employee's discharge to a suspension.

Although the First and Fifth Circuits have been in the forefront in rectifying the arbitral excess inherent in some awards, the other circuits have also consistently rejected awards which fail to draw their essence from the underlying collective

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4. There is no universal "common law of the shop." It will vary with each industry and each collective bargaining agreement.

bargaining agreement. Petitioner states that certain circuits are in conflict with the First and Fifth Circuits with respect to an arbitrator's authority to set aside a discharge, however, this is inaccurate and misrepresents the posture of the other circuits.

For instance, in the Eighth Circuit decision cited by Petitioner, *Midwest Coca-Cola Bottling Co. v. Allied Sales Division*, 89 F.3d 514 (8th Cir. 1996), the Court of Appeals distinguished its holding in that case from its other decisions involving different contract language. The Appeals Court noted that the CBA in *Midwest Coca-Cola* was unlike those contracts which allow companies to discharge employees for specific offenses *as well as* for just cause. The court discussed *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964), in which a company discharged an employee for falsifying a work record. In *Truck Drivers*, the proper cause provision in the CBA was immediately followed by a list of discharge offenses, including dishonesty. Because proper cause was explicitly defined for the arbitrator to include specific offenses, and the employee's conduct fell within one of the listed offenses, the discharge was proper under the terms of the contract. The *Midwest Coca-Cola* court also distinguished *Truck Drivers* in that the contract provided that dishonesty "*shall* be grounds for discharge." *Midwest Coca-Cola*, 89 F.3d at 517.[5]

The Agreement between Bruce Hardwood and the Union is similar to the one in *Truck Drivers*. First, the Company retains the express right to discipline and discharge employees for just cause. The next paragraph lists offenses which will result in immediate discharge. (Pet. App. E3). Therefore, the parties

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5. The *Midwest Coca-Cola* court also distinguished its holding in *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Local 6*, 715 F.2d 405 (8th Cir. 1983), in which it decided that the limiting terms in the CBA prevented an arbitrator from evaluating the discipline imposed by the company.

agreed as to what would constitute just cause for discharge. The Agreement did not contemplate that an arbitrator could find that an employee committed one of the listed offenses and then further consider whether just cause existed. Such an inquiry would be redundant and superfluous, and contrary to the intentions of the parties. In addition, the Agreement provides that violation of a listed offense "shall" result in discharge. Again, contract language is key to the determination of whether an arbitrator exceeded his authority and the Fifth Circuit properly concluded that the arbitrator did just that in the lower case.

In another Eighth Circuit decision, *Coca-Cola Bottling Co. v. Teamsters Local Union No. 688*, 959 F.2d 1438, *cert. denied*, 506 U.S. 1013, 121 L. Ed. 2d 566, 113 S. Ct. 635 (1992), the Appeals Court determined that an arbitrator could not consider only a just cause provision under an agreement which provided an exclusive termination remedy where the employee violated specific work rules. The court found that:

> The arbitrator found a rules violation, and termination was the bargained-for result. The language of the last chance agreement upon this issue is unambiguous . . . [t]he arbitrator did not have authority to alter the agreement by interpreting unambiguous language in a way contrary to its plain meaning, while attempting to characterize his actions outside of his authority as fact-finding.

Id. at 1442.

The Seventh Circuit has likewise concluded that arbitrators must adhere to the intentions of the parties as expressed by the clear wording in the CBA. However, in support of its Petition, Petitioner cites *AOI, Div. of Apogee Coal v. District 12, United*

Mine Workers of America, 85 F.3d 1289 (7th Cir. 1996), in which the contract between the parties specifically required just cause for *any* termination. The arbitrator in that case determined that although the employee had engaged in conduct which could be just cause for discharge, the company did not take into consideration the employee's work record and seniority in making the just cause determination. Unlike the Agreement between Bruce Hardwood and the Union, the language in the AOI contract provided that violation of work rules "may," not "shall" result in discipline. That contract further gave the arbitrator the discretion to reinstate any employee he felt the company discharged without just cause. Thus, the arbitrator in that case was given liberty to expand on the meaning of "just cause" and to consider mitigating factors when making a determination of whether just cause existed. The parties in *AOI*, unlike the parties in the instant case, gave the arbitrator explicit license to make a broad just cause inquiry; therefore the arbitrator did not exceed his authority in reshaping the discipline imposed by the company in that case.

Despite its holding, the court in *AOI* noted that it would have concluded that the arbitrator had exceeded his role and would have refused to enforce the award

> if the arbitrator had specifically found that AOI had just cause to discharge [employee], but then stated something to the effect of "fairness dictates that [employee] shouldn't have been discharged,"

AOI, 85 F.3d at 1293. Therefore, the Seventh Circuit is in agreement with the other circuits that an arbitrator may not base his award on some policy or feeling outside the contract. *Accord Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184-85 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010, 89 L. Ed. 2d 300, 106

S. Ct. 1184 (1986). *Ethyl Corp.*, cited by Petitioner, involved an arbitrator's interpretation of a contractual vacation pay provision, not the issue presented by Petitioner — the existence of just cause for termination. In upholding the arbitrator's award of vacation pay, the Court in *Ethyl* stated:

> This is not to say that simply by making the noises — the noises of contract interpretation — an arbitrator can shield from judicial correction an outlandish disposition of a grievance. There are cases, such as our *Young Radiator* case cited earlier, where no hypothesis other than that the arbitrator was importing into the dispute his own ideas of industrial justice would be tenable, no matter what he said.

Ethyl Corp., 768 F.2d at 186. The issues in *Young Radiator Co. v. International Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1985), are more closely akin to those considered below by the Fifth Circuit. The arbitrator in that case improperly decided that although the underlying CBA gave the company the right to discharge employees for theft, an earlier admitted theft had to be the motivating cause for a later discharge based on an unproven theft. The Court found that in making this determination, the arbitrator injected his own opinion as to how the contract should be read, and was unfaithful to his duty to literally interpret the contract.

The Appeals Court in *Young Radiator* reached its conclusion despite the arbitrator's failure to find that the particular misconduct had occurred. In *Bruce Hardwood*, the Fifth Circuit's decision to vacate the arbitrator's award was supported by the fact that the arbitrator found the misconduct to have occurred, but still fashioned his own remedy outside the contract. This an

arbitrator cannot do because where "the language of the agreement is clear and unambiguous, and . . . the parties agreed to it, they are bound by it." *Tootsie Roll Indus. v. Local Union No. 1, Bakery Workers' Int'l Union*, 832 F.2d 81, 84 (7th Cir. 1987) (arbitrator's award declining to apply appropriate contract provisions properly denied as outside agreement).

Only one of the Third Circuit cases cited by Petitioner involved the issue of just cause verses discharge for an express contractual reason. In *Tanoma Mining Co. v. Local 1269*, 869 F.2d 745 (3rd Cir. 1990), the Appeals Court reversed a district court's vacation of an arbitral award because the arbitrator found some support in the record for his decision. That case is distinguishable from the instant case in that it involved hotly contested and disputed historical facts about a preferential hiring agreement. In the present case, there is no dispute that the grievant admitted she lied to her employer and the arbitrator acknowledged that the grievant had lied. However, the arbitrator ignored his own finding that the grievant engaged in immediate discharge misconduct pursuant to the contract and fashioned his own discipline.

The case of *News America Publications v. Local 103*, 918 F.2d 21 (3rd Cir. 1990), involved a dispute over an economic package. Only in *UTU Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376 (3rd Cir. 1995) did the arbitrator consider whether an employee was discharged for proper cause. Unlike the Agreement between Bruce and the Union, proper cause was not further defined in *UTU* to include a list of discharge offenses. Therefore, the court could not find that the arbitrator engrafted provisions on the contract when interpretation of just cause was left open for him. *Id.* at 380.

Finally, Petitioner examines two cases from the Sixth Circuit involving the same Company and Union at odds in the present

case. In *Bruce Hardwood Floors v. Southern Council of Industrial Workers*, 8 F.3d 1104 (6th Cir. 1993), the Company and the Union are the same, however, the contract language is substantially different from that considered here by the Fifth Circuit. In *Bruce Hardwood v. Southern Council*, the applicable contract language allowed the just cause analysis of an arbitrator to include "appropriate mitigating or aggravating circumstances." *Id.* at 1108. Additionally, the contract provided only that an employer "may" discharge an employee for committing one of a list of enumerated offenses. The arbitrator therefore considered a number of fact-specific mitigating factors in reinstating an employee who had committed a listed offense. The district court found that the arbitrator's award did not draw its essence from the contract, but the Sixth Circuit disagreed. The Appeals Court found that the arbitrator made an award consistent with the express contract provision to consider mitigating circumstances as opposed to his own "general considerations of fairness and equity." *Id.* Therefore, the precise language contained in the CBA was critical to the Sixth Circuit's holding.

The contract language which arguably gave the arbitrator the opportunity to consider outside factors in *Bruce Hardwood v. Southern Council* was also at issue in another Bruce Hardwood case, which the Sixth Circuit stated, *in dicta*, was wrongly decided by the district courts. *Southern Council of Industrial Workers v. Bruce Hardwood Floors*, 784 F. Supp. 1345 (M.D. Tenn. 1992).[6] The Sixth Circuit admitted, however, that in the Middle District of Tennessee case, the arbitrator overstepped his bounds by imposing on the Company a requirement that it

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6. Petitioner incorrectly cites this case as being appealed to and reversed by the Sixth Circuit. (Pet., p. 16). This is not correct. The case of *Southern Council v. Bruce Hardwood Floors* from the Middle District of Tennessee was never appealed, and the Sixth Circuit's mention of it in the *Bruce Hardwood v. Southern Council* case appealed from the Western District of Tennessee was merely dicta.

conduct a formal investigation and hearing before discharge. In any event, the basis of the Sixth Circuit's analysis was the inherent ambiguity in the term "just cause" within the CBA. The ambiguities that existed in the CBA considered by the Sixth Circuit do not exist in the CBA considered by the Fifth Circuit.

The reason for not respecting arbitration awards that are contrary to the express language of the contract is that it is evidence the arbitrator has gone on a frolic of his own and is not interpreting the contract. This is especially true where contracts contain language restricting an arbitrator's authority. Such limiting language is often considered by courts in reviewing whether an arbitrator properly applied a CBA. For instance, the CBA examined by the Fifth Circuit restricted the arbitrator's authority to venture outside the Agreement by prohibiting him from adding to, amending or departing from the terms of the Agreement. (Respondent's Appendix, Article 9, Section 3 at 1a). The arbitrator's exaction of his own penalty was rewriting of the Agreement contrary to the contract language that the arbitrator could not modify or change language in the Agreement.

In its zeal to overturn the decision of the Fifth Circuit, Petitioner has attempted to portray an invisible tension in the circuits with respect to vacating arbitrator awards. Petitioner's assertion that the Eighth, Seventh, Sixth, and Third Circuits are not in accord with the First and Fifth Circuits with respect to review of arbitration awards is misguided. In fact, the two Amicus Briefs submitted in support of the Petition cite cases from the Sixth and Seventh Circuits which are in line with the Fifth Circuit's decision. (Nat'l Academy of Arbitrators Brf., pgs. 3-4; American Arbitration Ass'n Brf., pg. 12).[7] Petitioner

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7. *Polk Brothers, Inc. v. Chicago Truck Drivers*, 973 F.2d 593, 599 (7th Cir. 1992); *Ficks Reed Co. v. Local 112*, 965 F.2d 123, 125 (6th Cir. 1992); *Browning-Ferris Industries of Tennessee, Inc. v. Teamsters Local Union No. 984*, No. 90-5933, 1991 U.S. App. LEXIS 24760 (6th Cir. Oct. 10, 1991).

conveniently selected cases from those circuits in which the courts refused to set aside arbitration awards, notwithstanding the particular factual circumstances and contractual language at issue in the cases. However, the cases cited by the Petitioner are all factually dissimilar and thereby distinguishable from the instant case. The factual distinctiveness of the cited cases nullifies Petitioner's argument that those cases prove the existence of a "recurring question of law on which the circuits are squarely in conflict." (Pet., p. 11). Nevertheless, Petitioner uses this unsubstantiated assertion of circuit conflict to unreasonably ask this Court to restate an already clear standard for review of arbitration awards.

Furthermore, Petitioner has failed to address whether the remaining circuits have adhered to the standard established by this Court in reviewing arbitral awards. For instance, the Second Circuit has set aside arbitration awards which go beyond express contract terms and reflect the arbitrator's own notions of industrial justice. *See Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95 (2nd Cir. 1991); *Leed Architectural Products, Inc. v. United Steelworkers of America, Local 6674*, 916 F.2d 63 (2nd Cir. 1990); *In re Marine Pollution Service*, 857 F.2d 91 (2nd Cir. 1988).

Also, the Fourth Circuit has refused to uphold an arbitration award in which

> the arbitrator manifested a disregard for the terms of the submission and a determination to exceed, if necessary, the limits of the authority and power conferred upon him. This we cannot approve.

Textile Workers Union v. American Thread Co., 291 F.2d 894, 899 (4th Cir. 1961).

More recently in *Mountaineer Gas Company v. Oil, Chemical & Atomic Workers Int'l Union*, 76 F.3d 606, 608, *cert. denied*, 136 L. Ed. 2d 38, 117 S. Ct. 80 (1996), the Fourth Circuit affirmed a district court decision to vacate an arbitral award which failed to draw its essence from the CBA. In that case, the company retained the authority under its drug policy to discharge an employee found to be in violation of the policy. The arbitrator found no proper cause for discharge because in his opinion, the policy should not have applied to a long-term employee with an unblemished work history, despite the contract's express prohibition against the arbitrator amending, adding to or subtracting from the CBA. The Court of Appeals agreed with the district court that the arbitrator was simply using the words "proper cause" as a loophole to bypass the mandatory language of the contract and implement his own brand of industrial justice. Therefore, like the Fifth Circuit in the case below, the Fourth Circuit has rejected an arbitrator's blatant effort to infuse "his personal feelings and sense of fairness into the award by creating an entirely new remedy." *Mountaineer Gas*, 76 F.3d at 610.

The Ninth and Tenth Circuits also have vacated arbitration awards which fail to draw their essence from the collective bargaining agreement. *Howard P. Foley Co. v. IBEW*, 789 F.2d 1421 (9th Cir. 1986); *International Union of Operating Engineers v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980). In *Kerr-McGee*, the lower court held that an arbitrator improperly ignored a provision in the contract requiring termination for making false statements to obtain sick leave. In that case, the Tenth Circuit found it to be well-settled that an arbitration award may not be contrary to the express language of the agreement. *Accord Fabricut, Inc. v. Tulsa General Drivers*, 597 F.2d 227 (10th Cir. 1979); *Mistletoe Exp. Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977).

Finally, the Eleventh Circuit concurs with the other circuits that unauthorized action by an arbitrator which is contrary to the CBA will not be provided deference. *Warrior & Gulf Nav. Co. v. United Steelworkers*, 996 F.2d 279 (11th Cir. 1993), *reh'g in banc denied*, 12 F.2d 221, *cert. denied*, 511 U.S. 1083, 128 L. Ed. 2d 462, 114 S. Ct. 1834 (1994); *Bruno's Inc. v. United Food and Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529 (11th Cir. 1988). In *Bruno's*, the Circuit Court held that

> Although we are mindful of the great latitude to be given to an arbitrator's interpretation of a collective bargaining agreement, the portion of the arbitrator's award that writes and imposes a new . . . policy on Bruno's in direct conflict with the express terms of the collective bargaining agreement was properly vacated.

Id. at 1532. Therefore, the law in all the circuits is clear — an arbitrator has a responsibility to adhere to the contract as submitted by the parties, especially when his authority is expressly limited by the terms of the contract, as it was in the Agreement between Bruce Hardwood and the Union.

One side will always be dissatisfied with the result of an arbitration hearing. However, Congress and this Court have provided a fair mechanism for the dissatisfied party to seek review of an arbitration decision with which it disagrees. The parties have utilized this mechanism in the present case and the Fifth Circuit has concluded that the arbitrator exceeded his authority in making his award. In reaching its decision, the Fifth Circuit properly stated and applied the rule of law surrounding review of arbitration awards as articulated by this Court. Certiorari should not be granted merely to provide the Union

another opportunity to plead its case, especially in light of the lack of conflict in the circuits regarding the application of the standard for review of labor arbitration awards.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Union's Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ARTICLE 9, SECTION 3 OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 9

ARBITRATION

* * *

Section 3 No arbitrator shall have authority to add to, amend or depart from the terms of this written Agreement in effect at the time of the occurrence of the grievance being arbitrated.